

(29,550)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 295.

DORA E. ROOKER AND WILLIAM V. ROOKER,
APPELLANTS,

vs.

FIDELITY TRUST COMPANY, TRIANGLE REALTY
COMPANY, AND THOMAS WEST.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF INDIANA.

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[fol. 1] CAPTION

PLEAS OF

**THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF INDIANA**

AT THE UNITED STATES COURT HOUSE, IN THE CITY OF INDIAN-
APOLIS, IN SAID DISTRICT, BEFORE THE HONORABLE ALBERT B.
ANDERSON, JUDGE OF SAID DISTRICT COURT

In Equity. No. 665

DORA E. ROOKER, WILLIAM V. ROOKER, Plaintiffs,

v.

FIDELITY TRUST COMPANY, TRIANGLE REALTY COMPANY, THOMAS
WEST, Defendants.

Be it remembered that heretofore towit: at the November term of
said Court, on the 17th day of March, 1923, before the Honorable
Albert B. Anderson, Judge of said Court, the following proceedings
in the above entitled cause were had, towit:

Come now the complainants, by their solicitors, and file bill of
complaint in the above entitled cause which bill of complaint is in
the words and figures following, towit:

[fol. 2] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF INDIANA

In Equity. No. 665

[Title omitted]

BILL OF COMPLAINT

To the Honorable Albert B. Anderson, Judge of the District Court
of the United States for the District of Indiana:

Dora E. Rooker and William V. Rooker file this their Bill of
Complaint against the Fidelity Trust Company, the Triangle Realty
Company and Thomas West, and thereupon your orators complain
and say:

1. That on, towit, the eleventh (11th) day of October, 1909, and
long prior thereto, the said William V. Rooker and Dora E. Rooker,
plaintiffs, were husband and wife.

2. That said Fidelity Trust Company is a corporation organized and operating in the State of Indiana pursuant of an Act of the [fol. 3] General Assembly of said State entitled, "An Act to authorize the organization and incorporation of loan and trust and safe deposit companies, and defining their powers, rights and duties and other matters connected therewith," approved March 4, 1893, and acts amendatory thereof and supplemental thereto. (2 Burns R. S. 1914, Secs. 4942-4962c).

3. That said Triangle Realty Company is a corporation organized and operating in the State of Indiana pursuant of an Act of the General Assembly of said State entitled "An Act concerning the organization and perpetuity of voluntary associations, repealing all laws in conflict therewith, legalizing the organization of certain associations organized under former laws, and declaring an emergency," approved March 9, 1901, and acts amendatory thereof and supplemental thereto. (2 Burns R. S. 1914, Secs. 4286-4330). And Thomas West is a resident of Hamilton County Indiana.

4. That in behalf of said defendants the State of Indiana, with the enactment of a certain statute and with certain judicial proceedings, has attempted, in contravention of Article I, Section 10 of the Constitution of the United States, to impair and has impaired and threatens to continue to impair the obligation of a certain contract called "the trust agreement" made and entered into by and between these plaintiffs and said Fidelity Trust Company, which contract is hereinafter more fully stated and described; that to protect the obligation of said contract against such impairment and [fol. 4] threatened impairment this suit is begun and these plaintiffs here now claim the protection of said section of said article of said Constitution.

5. That in behalf of said defendants the State of Indiana, with certain pretended judicial proceedings has attempted in contravention of the Fourteenth Amendment of the Constitution of the United States, to take and it has taken and it threatens to continue the taking of the property of these plaintiffs without due process of law and in denial to these plaintiffs of the equal protection of the law and these plaintiffs here now claim the protection of said Amendment of said Constitution in behalf of their property and their rights.

6. That on, to wit, the eleventh (11th) day of October, 1909, and long prior thereto the plaintiff, Dora E. Rooker, was the owner of the following described real estate in Hamilton County, in the State of Indiana, to wit:

"All the west half of the north half of Section eighteen (18), Township eighteen (18), north, range five (5), east, lying west of the Lake Erie and Western Railroad, containing ninety-two (92) acres more or less.

"Also, the southwest quarter of section seven (7), township eighteen (18), north, range five (5) east lying west of the Lake Erie and Western Railroad and east of White River containing forty-eight (48) acres more or less.

"Also, the southwest quarter of section twelve (12), township eighteen (18), north, range four (4), east, containing sixty (60) acres more or less and lying south and east of White River.

[fol. 5] "Also, that part of the northeast quarter of section thirteen (13), township eighteen (18), north, range four (4), east, more particularly described as follows: Beginning at the northeast corner of said section and running thence west with said section line one hundred and thirty-two (132) rods, more or less, to White River, thence southerly along said stream with the meanderings thereof to a point thirty-nine and ninety-five hundredths (39.95) south of the north line of said section; thence east sixty-five and eighty hundredths (65.80) rods; thence south seventy-three and fifteen hundredths (73.15) rods; thence east sixty-eight and twenty-five hundredths (68.25) rods; thence north one hundred fifteen and twenty hundredths (115.20) rods, to the place of beginning, containing seventy-five (75) acres more or less.

7. That on, to wit, the eleventh (11th) day of October, 1909, and long prior thereto the plaintiffs, as tenants by the entireties were the owners of the following described real estate in Marion County, in the State of Indiana, to wit: The southeast quarter of the northeast quarter of section thirty-three (33), township seventeen (17), north, range four (4), east, containing forty (40) acres more or less; also, the southwest quarter of the northwest quarter of section thirty-three (33), township seventeen (17), north, range four (4), east, containing forty (40) acres more or less.

8. That on, to wit, the eleventh (11th) day of October, 1909, the plaintiffs for the consideration therein stated executed to and with the defendant, Fidelity Trust Company, a certain contract in writing [fol. 6] ing herein called "the Trust Agreement in the words and figures following, to wit:

"This memorandum executed in duplicate at the City of Indianapolis, Indiana, this 11th day of October, 1909, by and between Dora E. Rooker and William V. Rooker, her husband, of Hamilton County, Indiana, first parties, and the Fidelity Trust Company of Indianapolis, Indiana, second party, witnesseth:

"Paragraph 1. That concurrently herewith and as a part of the contract evidenced by this memorandum, the said first parties have this day by their certain written instruments in the form of a general warranty deed conveyed to second party as trustee, ever upon the conditions and trust and upon the powers and for the uses and purposes herein more particularly set forth, the following real estate in Marion County, in the State of Indiana, to wit:

The southeast quarter of the northeast quarter of section thirty-three (33), township seventeen (17), north, range four (4), east, containing forty (40) acres more or less; also, the southwest quarter of the northwest quarter of section thirty-three (33), township seventeen (17), north, range four (4), east, containing forty (40) acres more or less.

Also, the following real estate in Hamilton County, in the State of Indiana, to wit:

[fol. 7] All the west half of the north half of section eighteen (18) north, range five (5), east, lying west of the Lake Erie and Western Railroad, containing ninety-two (92) acres more or less;

Also, the southwest quarter of section seven (7), township eighteen (18), north, range five (5), east, lying west of the Lake Erie and Western Railroad and east of White River, containing forty-eight (48) acres more or less;

Also, the southwest quarter of section twelve (12), township eighteen (18), north, range four (4), east, containing sixty (60) acres more or less and lying south and east of White River;

Also, that part of the northeast quarter of section thirteen (13), township eighteen (18), north, range four (4), east, more particularly described as follows: Beginning at the northeast corner of said section and running thence west with said section line one hundred and thirty-two (132) rods, more or less to White River; thence southerly along said stream with the meanderings thereof to a point thirty-nine and ninety-five hundredths (39.95) rods south of the north line of said section; thence east sixty-five and eighty hundredths (65.80) rods; thence south seventy-three and fifteen hundredths (73.15) rods to the place of beginning, containing seventy-five (75) acres more or less.

That reference is hereby made to the said warranty deeds and to the several descriptions therein for greater certainty.

"Paragraph 2. That said warranty deed is made ever upon the conditions and trust and upon the powers and for the uses and pur [fol. 8] poses herein more particularly set forth, that is to say: Whereas the said Dora E. Rooker, the grantor in said deed and first party herein, is the owner in her own and separate right and estate of the said above described lands situate in said Hamilton County, and the said Dora E. Rooker and William V. Rooker, her husband, grantors in said deed and parties of the first part, are the owners as tenants by the entireties of said real estate situate in said Marion County; and whereas the said Dora E. Rooker in and about the improvement of her said real estate in Hamilton County, Indiana, has heretofore undertaken to erect and construct a dwelling house and outbuildings appurtenant thereto and other necessary and proper structures, and to equip the same with modern utilities and conveniences, and in so doing has been obliged to lay out and expend large sums of money, and has been obliged to incur obligations beyond her reasonable expectations and beyond her present means to pay; and whereas, the said improvements have been carried so far toward completion as that they cannot now be abandoned or the work thereon stopped or delayed without great sacrifice and loss to the said Dora E. Rooker and without great injury to her estate; and whereas, it requires Six Thousand and no/100 Dollars (\$6,000.00) to complete said improvements and to pay off indebtedness of said Dora E. Rooker incurred by her, arising out of the making of the said improvements and in the completion and installation thereof, and said Dora E. Rooker represents that all such indebtedness was [fol. 9] incurred by her for her own benefit arising out of the making of said improvements: Now, therefore, it is agreed that the

said Fidelity Trust Company, second party herein, shall and it does hereby accept the title of, in and to said real estate ever upon the conditions and trust and upon the powers and for the uses and purposes following, that is to say:

"Clause A. The Fidelity Trust Company shall pay and it does hereby agree to pay from time to time upon the written order and directions of said Dora E. Rooker not exceeding the sum of Six Thousand and no/100 Dollars (\$6,000.00) for and on account of the erection and construction of said dwelling house, outbuildings and improvements and their equipment and installation, it being expressly understood and agreed that if a part of said indebtedness is held or may hereafter be held by banks on account of advancements made and which may hereafter be made to said Dora E. Rooker, or to the said William V. Rooker, as the undisclosed principal or said Dora E. Rooker, it is ever understood and agreed that the written order and direction of the said Dora E. Rooker that an indebtedness be paid for her use and benefit, notwithstanding the form of said indebtedness shall be forever binding and conclusive on all parties concerned, that such debt or debts so ordered to be paid is and are in fact and in law the debts of the said Dora E. Rooker, any evidence to the contrary notwithstanding.

"Clause B. The said Fidelity Trust Company may let out and [fol. 10] expend any such sum or sums of money other than those above specified in Clause A of this paragraph as said trust company may deem necessary to protect its interest in and to said real estate, and to perform or better promote the performance of the trust herein and hereby created, and every such advancement or payment so made shall be deemed and taken to be the debt of the said Dora E. Rooker as fully as if the same were made upon her express written direction.

"Clause C. That the said Fidelity Trust Company may obtain or cause to be obtained from any bank or banks upon the promissory note or notes of the said Dora E. Rooker any such sum or sums of money, whether within or in excess of the sum of Six Thousand and no/100 Dollars (\$6,000.00) as may be necessary to the true and better and complete performance of this contract and to the successful maintenance of and care for said real estate and the business thereon conducted.

"Clause D. Said Fidelity Trust Company is hereby appointed, empowered, and authorized as the true and lawful attorney-in-fact of the first parties, and in their separate deed, joint name, place, right and stead to execute a deed of general warranty conveying said real estate or any part or parts thereof upon the limitations hereinafter stated and provided.

"Paragraph 3. Said Fidelity Trust Company shall have and receive for its compensation, trustee's fee of One Hundred and Fifty and no/100 Dollars (\$150.00) and a commission of two per cent on [fol. 11] all loans and advancements and on any and all moneys laid out and expended by it to protect its interest or to promote the true and better performance of this trust, together with interest on all

such moneys at the rate of six per cent per annum, to be credited semi-annually to said Fidelity Trust Company as a debt and charge against said Dora E. Rooker, and said Fidelity Trust Company shall be entitled to have and receive the usual real estate commission on all or any part of said real estate sold by said Fidelity Trust Company pursuant to this agreement, and said Fidelity Trust Company shall be entitled to have and receive a brokerage fee of one-eighth ($\frac{1}{8}$) of one (1) per cent on all notes for ninety (90) days or less for moneys obtained from any bank to the credit of said Dora E. Rooker on her paper originally made.

"Paragraph 4. It is further ever understood and agreed that at any time within one (1) year after the date of these presents said second party may execute and perform so much of the power to sell and convey as is hereinbefore granted as pertains to said Marion County real estate, provided always that the sum received in consideration therefor shall be net to the credit of said Dora E. Rooker Eighteen Thousand and no/100 Dollars (\$18,000.00) after the payment of the commission hereinbefore mentioned. Should it so happen that said Marion County real estate be not sold within said period of one (1) year for said sum of Eighteen Thousand and no/ [fol. 12] 100 Dollars (\$18,000.00) plus commission, then after ninety (90) days' notice in writing to be given to first parties by second party, the said second party may publicly advertise said Marion County real estate and sell the same at whatever sum it may bring, and if said Marion County real estate does not sell for lack of a bid, then second party may upon ninety (90) days' notice in writing to be given to the first parties by the second party sell and convey said Hamilton County real estate for whatever it will bring over and above the upset price of sixty-five thousand and no/100 dollars (\$65,000.00). If said Hamilton County real estate does not sell for said sum of Sixty-five Thousand and no/100 Dollars (\$65,000.00) for lack of a bid of that sum, then the said second party hereto may publicly advertise and sell said Marion County real estate after ninety (90) days' notice given in writing to the first parties by second party at public auction for whatever sum and price said real estate may bring. And if said Marion County real estate upon such sale does not fetch enough to pay the moneys and perform the obligations herein charged upon and against said real estate, then said second party may proceed to sell and sell said Hamilton County real estate in the manner and form prescribed as to said Marion County real estate, after thirty (30) days' notice given in writing to first parties by second party.

"It is ever understood and agreed that said Fidelity Trust Company shall apply the proceeds of any sale or sales of real estate made pursuant to this agreement, as follows:

"(1) To the payment of any mortgage or other valid lien, charge, [fol. 13] adverse interest or incumbrance upon and against said real estate or any part of any of the real estate herein described, which may be prior and superior and adverse to the interest of said Fidelity Trust Company.

"(2) To the payment of moneys advanced by second party to first parties or paid to the use and benefit of first parties as herein authorized and provided.

"(3) To the payment of moneys obtained by said second party from any bank or banks to the use and benefit of said Dora E. Rooker upon her paper as hereinbefore authorized and provided.

"(4) The rest and residue of any money shall be paid to the said Dora E. Rooker, her heirs, executors, administrators and assigns.

"Paragraph 5. It is further understood and agreed that any and every deed of conveyance executed by second party pursuant to the provisions of this contract shall convey to the grantee therein named an absolute and unqualified estate as fully and completely as if such deed were made by the said first parties in their own proper persons, names and rights. And the said first parties do now hereby ratify, approve and confirm any and every such deed made by second party pursuant to this memorandum and in execution of the powers and upon the trust and confidence herein and hereby imposed.

"Paragraph 6. In execution whereof the several parties hereto do [fol. 14] hereby forever bind themselves, their heirs, executors and assigns."

In execution whereof the several respective parties have hereunto affixed their hands and seals at the date and place first above written.

(Signed) Dora E. Rooker. (Seal.) (Signed) William V. Rooker. (Seal.) (Signed) Fidelity Trust Company (Seal), (Signed) Per W. M. Fogarty (Seal), President.
Attest: (Signed) Thomas B. Fulmer, Secretary.

9. That concurrently with said agreement of October 11, 1909, and as a part thereof, said Dora E. Rooker and William V. Rooker at the same time executed their certain trust deed with covenant of warranty to said Fidelity Trust Company as Trustee in the words and figures following, to wit:

"This indenture witnesseth, That Dora E. Rooker and William V. Rooker, her husband, of Hamilton County, State of Indiana, in consideration of One Dollar (\$1.00) the receipt of which is hereby acknowledged, and other good and valuable considerations by them had, convey and warrant to the Fidelity Trust Company, of Indianapolis, Indiana, Trustee, the following real estate in Hamilton County, State of Indiana, to wit:

"All the west half of the north half of section eighteen (18), township eighteen (18), north, range five (5), east, lying west of the Lake Erie and Western Railroad, containing ninety-two (92) acres more or less;

"Also, the southwest quarter of section seven (7), township eighteen (18), north, range five (5) east, lying west of the Lake Erie and [fol. 15] Western Railroad and east of White River, containing forty-eight (48) acres more or less;

"Also, the southwest quarter of section twelve (12), township eighteen (18), north, range four (4), east, containing sixty (60) acres more or less and lying south and east of White River.

"Also, that part of the northeast quarter of section thirteen (13), township eighteen (18), north, range four (4), east, more particularly described as follows: Beginning at the northeast corner of said section and running thence west with said section line one hundred and thirty-two (132) rods more or less to White River; thence southerly along said stream with the meanderings thereof to a point thirty-nine and ninety-five hundredths (39.95) rods south of the north line of said section; thence east sixty-five and eighty hundredths (65.80) rods; thence south seventy-three and fifteen hundredths (73.15) rods; thence east sixty-eight and twenty-five hundredths (68.25) rods; thence north one hundred and fifteen and twenty hundredths (115.20) rods to the place of beginning, containing seventy-five (75) acres more or less.

"To have and to hold said real estate however in trust for the use and benefit of said Dora E. Rooker and to protect and discharge the obligations arising out of claims and liens or the right to liens by reason of improvements made on the above described real estate.

"Said Fidelity Trust Company of Indianapolis, Indiana, as aforesaid, to sell and convey said lands or any part of them at such prices and upon such terms as may be from time to time dictated in writing [fol. 16] by said Dora E. Rooker; to execute the proper trustee's deed or deeds conveying the title thereto in fee simple to the purchaser; it being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as this grantor could herself do, and any such purchaser or purchasers shall in no wise be responsible for the application of the proceeds arising from such sale in the hands of said Fidelity Trust Company of Indianapolis, Indiana.

"And said Fidelity Trust Company of Indianapolis, as such trustee, shall have full power and authority to make contracts in writing for the sale of the foregoing real estate, or any part or all of said real estate, and convey same free and clear of any incumbrance or convey the same subject to any existing incumbrances, and to do any and all acts and to execute any and all papers which may be necessary to protect the interests of this grantor, the mortgagee and other lienholders in and to said real estate and to conserve the trust hereby created.

"And in the event any such liens or charges against said real estate be paid by the Fidelity Trust Company, trustee, the said Fidelity Trust Company, trustee, shall be subrogated to all the rights of such original lienholders and the same shall be enforceable by it and collectible with interest at the rate of six (6) per cent per annum, to be credited semi-annually as a debt and charge against [fol. 17] said real estate.

"This conveyance is made subject to the taxes for the years 1908 and 1909 and subject, also, to a certain mortgage executed to the

American Central Life Insurance Company by this grantor and William V. Rooker, her husband, on November 19, 1908. Said mortgage secured the payment of a certain principal note of said grantor in the sum of Fourteen Thousand and no/100 Dollars (\$14,000.00) together with interest thereon and recorded in Mortgage Record 52, page 84, in the office of the Recorder of Hamilton County, Indiana.

"In witness whereof said Dora E. Rooker and William V. Rooker, her husband, have hereunto set their hands and seals this eleventh (11th) day of October, 1909.

(Signed) Dora E. Rooker. (Signed) William V. Rooker.

STATE OF INDIANA,
County of Marion, ss:

"Before me the undersigned Notary Public personally appeared William V. Rooker and Dora E. Rooker, his wifie, and acknowledged the execution of this deed.

"Witness my hand and notarial seal this eleventh (11th) day of October, 1909.

(Signed) Wm. J. McCoy. My commission expires July 23, 1910."

10. That upon its execution said deed was duly recorded in the Recorder's Office of Hamilton County, Indiana.

[fol. 18] 11. That concurrently with said agreement of October 11, 1909, and as part thereof, said Dora E. Rooker and William V. Rooker, at the same time executed their certain trust deed with covenant of warranty to said Fidelity Trust Company as trustee in the words and figures following, towit:

"This indenture witnesseth that William V. Rooker and Dora E. Rooker, husband and wife, of Hamilton County, State of Indiana, in consideration of One Dollar (\$1.00), the receipt of which is hereby acknowledged, and other good and valuable consideration by them had, convey and warrant to Fidelity Trust Company of Indianapolis, Indiana, Trustee, the following real estate in Marion County, towit:

"The southeast quarter of the northeast quarter of section thirty-three (33), township seventeen (17), north, range four (4), east, containing forty (40) acres more or less;

"Also, the southwest quarter of the northwest quarter of section thirty-three (33), township seventeen (17), north, range four (4) east, containing forty (40) acres, more or less.

"To have and to hold said real estate however in trust for the use and benefit of said grantors, William V. Rooker and Dora E. Rooker, and to protect and discharge the obligations of the trust herein with the powers and limitations as follows:

"Said Fidelity Trust Company of Indianapolis, trustee as aforesaid, to sell and convey said real estate according to the terms of a [fol. 19] certain contract of even date herewith within one (1) year

after the date of these presents for a consideration fixed in said contract, and should it so happen that said real estate be not sold within said period of one (1) year, for the sum nominated in said contract, then after ninety (90) days' notice in writing, to be given to the grantors by the trustee herein, the trustee may publicly advertise said real estate and sell same at public or private sale at such price as it may bring and upon the consummation of such sale as may be made by said Fidelity Trust Company of Indianapolis as such trustee, to execute the proper trustee's deed conveying the title thereto in fee simple to its said purchasers. It being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis, trustee, shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as these grantors could themselves do, and any such purchaser or purchasers shall in no wise be responsible for the application of the proceeds arising from such sale in the hands of the said Fidelity Trust Company of Indianapolis, trustee, but said Fidelity Trust Company is directed to apply the proceeds arising from such sale in the manner and for the purposes set out in the contract entered into between said grantors and said Fidelity Trust Company, trustee, on this date.

"The said Fidelity Trust Company of Indianapolis, as such trustee, shall have full power and authority to make contracts in writing [fol. 20] for the sale of the foregoing real estate or any part or all of said real estate and convey the same free and clear of any incumbrance or subject to any existing incumbrances, and to do any and all acts and to execute any and all papers which may be necessary to protect the interest of the grantors in and to said real estate and to conserve the trust hereby created, and it is hereby further understood and agreed that if the said Fidelity Trust Company of Indianapolis, as trustee, shall elect to pay any lien, charge or incumbrance existing against said real estate, the said Fidelity Trust Company of Indianapolis, trustee, shall be subrogated to all the rights, title and interest held by the original parties thus paid, and the same shall be collectible and enforceable in its hands, together with interest thereon at the rate of six (6) per cent. per annum, to be credited semi-annually to said Fidelity Trust Company as a debit and charge against the grantors and the real estate above described.

"This conveyance is made subject to the taxes for the years 1908 and 1909 and subject, also to a certain mortgage executed March 19, 1909, by the grantors, William V. Rooker and Dora E. Rooker, husband and wife, to Indianapolis Life Insurance Company to secure the payment of one (1) principal note of the sum of Six Thousand and no/100 Dollars (\$6,000.00) and interest coupons thereon, which mortgage is recorded in Mortgage Record 523, Page 128 in [fol. 21] the Office of the Recorder of Marion County, State of Indiana.

"In witness whereof said William V. Rooker and Dora E. Rooker have hereunto set their hands and seals this eleventh (11th) day of October, 1909.

(Signed) William V. Rooker. (Signed) Dora E. Rooker.

STATE OF INDIANA,
Marion County, ss:

Before me, the undersigned Notary Public, personally appeared William V. Rooker and Dora E. Rooker, husband and wife, and acknowledged the execution of this deed.

Witness my hand and notarial seal this eleventh (11th) day of October, 1909.

(Signed) Wm. J. McCoy, Notary Public. My Commission expires July 23, 1910."

12. That upon its execution said deed was duly recorded in the Recorder's Office of Marion County, Indiana.

13. That upon the execution of said trust agreement and said several trust deeds, each of the parties entered upon the performance of said trust agreement, but soon thereafter said Fidelity Trust Company refused further to perform its duties under said trust agreement and in wrongful disregard and violation of the rights of these plaintiffs in the premises said Fidelity Trust Company renounced its said office of trustee and repudiated said trust agreement; that on, to wit, October 28, 1912, Mr. Smith and Mr. McNulty, officers of [fol. 22] the Fidelity Trust Company, being duly empowered for the purpose, went to the residence of Dora E. Rooker and William V. Rooker and read to them and delivered to them a copy of a written instrument as follows:

"Demand and Tender of Deed

"To Dora E. Rooker and William V. Rooker, Her Husband, Noblesville, Indiana:

"The undersigned, Fidelity Trust Company, trustee, and Fidelity Trust Company, hereby demand payment to them of the sum of Eighteen Thousand Four Hundred and Fifty-Three Dollars and Thirty-Four Cents (\$18,453.34) due on account of advancements made under agreement of trust and secured by the Hamilton County farm, and demand payment of the sum of One Thousand Two Hundred and Forty Dollars and Seventy Cents (\$1,240.70) due on account of advancements made under agreement of trust and secured by the Marion County farm, making a total of Nineteen Thousand Six Hundred and Ninety-Four Dollars and Four Cents (\$19,694.04), and the said Fidelity Trust Company, trustee, herewith tenders for delivery its quit claim deeds conveying and quit claiming said Hamilton County and Marion County farms to the original grantors upon payment to them of the foregoing demand; and further gives notice that upon failure to make payment of the aforesaid sum, upon demand now made, that said quit claim deeds will remain at the office of Fidelity Trust Company for delivery until October 30, 1912, upon payment of the aforesaid demand.

[fol. 23] (Signed) Fidelity Trust Company, Trustee, (Signed) By W. M. Fogarty, President. (Signed) Fidelity Trust Company, (Signed) By W. M. Fogarty, President. Attest: (Signed) James G. Flaherty, Secretary. (Seal Fidelity Trust Company, Indianapolis, Ind.)

14. On October 30, 1912, Dora E. Rooker, with her husband, William V. Rooker, joining, began suit in the Marion Circuit Court against the Fidelity Trust Company, to redeem said trust estate and for an accounting to ascertain the extent of interest of the Fidelity Trust Company in said property and to fix an upset time for the payment of any sum which might be found due to said Fidelity Trust Company; that a receiver was sought to be appointed to take over and hold said real estate upon the terms and conditions of said trust agreement pending said litigation and to perform with respect thereto such duties as the court might from time to time direct and that damages sustained by said Dora E. Rooker, because of the non-performance of said contract be ascertained and that she be given judgment accordingly; that thereafter the venue of said cause was changed to the Hamilton Circuit Court of Indiana, where the same was docketed as Cause Number 16338 and to the records and files [fol. 24] in said Cause, these plaintiffs now make reference for greater certainty; that thereafter said complaint was amended to bring in certain pretended holders of mechanic liens, but these new parties, having heretofore in due form gone out of this case, further reference to them is not required and need not be made after this clause of this Bill of Complaint; that said amended complaint omitting the caption thereof, and the subscription of counsel thereto, averred, viz:

Dora E. Rooker and William V. Rooker, her husband, for cause of action as by amended complaint against the defendant, Fidelity Trust Company of Indianapolis, Indiana, James W. Lilly and Frank D. Stalnaker, doing business as partners in the firm name and style of Lilly & Stalnaker, Illinois Surety Company, Balke & Krause Company, and Daniel I. Neher, say:

That on, to wit, the eleventh (11th) day of October, 1909, the plaintiff, Dora E. Rooker, her said husband joining, executed their certain warranty deed, wherein and whereby they conveyed to said Fidelity Trust Company the following real estate in Marion County, in the State of Indiana, to wit: The Southeast quarter of the northeast quarter of section thirty-three (33), township seventeen (17), north, range four (4) east; also, the southwest quarter of the northwest quarter of section thirty-four (34), township seventeen (17), [fol. 25] east, said tracts containing eighty (80) acres, more or less.

And, also, the following real estate in Hamilton County, in the State of Indiana, to wit: All of the west half of the north half of section eighteen (18), township eighteen (18), north, range five (5), east, lying west of the Lake Erie and Western Railroad; also, the southwest quarter of section seven (7), township eighteen (18), north, range five (5), east, lying west of the Lake Erie Railroad and east of White River. Also the southwest quarter of section twelve (12), township eighteen (18), north, range four (4), east, lying south and east of White River.

Also, all that part of northeast quarter of section thirteen (13), township eighteen (18), north, range four (4), east, more particularly described as follows: Beginning at the northeast corner of said section and running thence west with said section line one hun-

dred thirty-two (132) rods more or less to White River; thence southerly along said stream to a point thirty-nine and ninety-five hundredths (39.95) rods south of the north line of said section; thence east sixty-five and eighty hundredths (65.80) rods; thence south, seventy-three and fifteen hundredths (73.15) rods; thence East sixty-nine and twenty-five hundredths (69.25) rods; thence north one hundred fifteen and twenty hundredths (115.20) rods to the place of beginning, said several tracts of land in Hamilton County containing in all two hundred seventy-five (275) acres, more or less. [fol. 26] That said warranty deed was executed concurrently with a certain instrument of trust defining and limiting the interest and estate of said Fidelity Trust Company in and to said real estate, a copy of which trust agreement marked "Exhibit A" is filed herewith.

That said real estate so conveyed was at the time of the reasonable value of One Hundred Thousand and no/100 Dollars (\$100,000.00); and that in and by said trust agreement said Fidelity Trust Company undertook and agreed to pay off certain indebtedness of said Dora E. Rooker arising out of, and incident to the making of certain improvements on said real estate; that said improvements had at that time been carried so far toward completion as that they could not then be abandoned nor the work thereon stopped or delayed without great sacrifice and loss to the said Dora E. Rooker and without great injury to her estate; that it then required at least Six Thousand and no/100 Dollars (\$6,000.00) to complete said improvements and to pay off said indebtedness of said Dora E. Rooker incurred by her out of the making of said improvements and in the completion and installation thereof; that in consideration of the premises and in consideration of the conveyance of said land to Fidelity Trust Company and in consideration of the promise of said Dora E. Rooker to pay certain rates, fees and charges named and specified in said trust agreement, the said Fidelity Trust Company promised and agreed thereafter to pay from time to time upon the written order [fol. 27] and direction of said Dora E. Rooker Six Thousand and no/100 Dollars (\$6,000.00) for and on account of the erection and construction of said dwelling house, outbuildings and improvements and the equipment and installment thereof and such other sum or sums of money than those above specified as might be necessary to perform or better promote the performance of said trust and to the end that such additional funds might be obtained said Fidelity Trust Company covenanted and agreed to obtain from other bank or banks upon the promissory note of said Dora E. Rooker all such sums or sum of money whether within or in excess of the sum of Six Thousand and no/100 Dollars (\$6,000.00) as might be necessary to the true and better and complete performance of said contract and to the successful maintenance of and care of said real estate and the business thereon conducted, and to that end it became necessary for said Fidelity Trust Company to protect and preserve the credit of said Dora E. Rooker at the banks at which she did business, and to do every other act as might be necessary and proper to the complete performance of said contract; that said Fidelity Trust Company further

undertook to sell said real estate and close said trust within two (2) years after the date of the execution of said instrument and in the particular manner stipulated and described in Paragraph four (4) of said Trust Deed to which reference is hereby made for greater certainty.

That said Fidelity Trust Company in wrongful disregard of its [fol. 28] duties in the premises and violation of the rights of the said Dora E. Rooker failed and refused to pay off said indebtedness and failed and refused to protect and preserve the credit of said Dora E. Rooker at banks and failed and refused to continue or permit the continuance of the work of said improvement and the completion and installation thereof, but on the contrary said Fidelity Trust Company failed and refused to pay said indebtedness and falsely and wrongfully misrepresented the credit and condition of the said trust estate and wholly destroyed the credit of the said Dora E. Rooker at banks and elsewhere and said Trust Company stopped work on said improvement and forced and required contractors to abandon work thereon in such manner as that said Dora E. Rooker was wholly without recourse against said contractors, and said Fidelity Trust Company caused and required said contractors to turn over and assign to it their said contracts and it wrongfully caused and required them to encumber said real estate and cloud the title thereof with notices of liens and otherwise and it also wrongfully caused them to sue on claims all to the end that said trust estate might be so wasted and wrecked as that said trust estate could the better be appropriated by the said Fidelity Trust Company and to that end it caused its co-defendants herein to be and become parties to its said breaches of said contract by filing notices of lien and instituting suits against these plaintiffs; that said actions at law are now pending and said liens are of record and these plaintiffs aver that said Fidelity Trust [fol. 29] Company is the real party in interest in said record liens and in said pending actions; that said co-defendants herein are each made parties to answer to their respective interest in the premises; that said Fidelity Trust Company has failed and refused to pay the taxes and interest charged against said real estate but has allowed the same to become delinquent and in default and has refused to sell said real estate or any part thereof though it has had the opportunity so to do, having in one instance had an opportunity to dispose of said real estate in Marion County at a fair cash valuation of Twenty-three Thousand and no/100 Dollars (\$23,000.00); and it failed and refused to make provisions for the maintenance of the business carried on on said real estate, by reason whereof crops thereon were wholly lost and said Marion County farm remained idle and wholly unproductive for two (2) years at an annual loss of Fifteen Hundred and no/100 Dollars (\$1,500.00); that by reason of the premises the said Dora E. Rooker has been damaged Fifteen Thousand and no/100 Dollars (\$15,000.00); that prior to the beginning of this suit said Trust Company wholly repudiated its said trust and served written notice thereof on these plaintiffs; that a copy of said notice, marked "Exhibit Number One" is filed herewith.

Wherefore these plaintiffs demand judgment, that an accounting be had of the extent of the interest of said Fidelity Trust Company in and to said property and that a reasonable time be fixed in which [fol. 30] said indebtedness may be paid, and that in the meantime a receiver be appointed to take over and hold said real estate upon the terms and conditions of said trust agreement, and to perform with respect thereto such duties as the court may from time to time direct, and that damages sustained by said Dora E. Rooker, because of the non-performance of said contract, be ascertained and that she be given judgment accordingly; that the said co-defendants of said Fidelity Trust Company be required to set up their several respective interests in the premises, or on default that they be forever barred and shut out and that the clerk of this court, upon the rendition of such judgment, be ordered and directed to enter of record the release and satisfaction of each and every such lien and incumbrance, and plaintiffs pray for all proper relief.

15. That the said memorandum of trust agreement, marked "Exhibit A" filed with said amended complaint is the same memorandum of trust agreement recited heretofore as Clause Number Eight (8) of this Bill of Complaint to which clause reference is hereby made for greater certainty.

16. That the said memorandum of notice of repudiation of said trust agreement and of renunciation of the office of trustee, marked "Exhibit Number One" is the same memorandum of notice recited heretofore as Clause Number thirteen (13) of this Bill of Complaint, to which clause reference is hereby made for greater certainty.

[fol. 31] 17. On March 24, 1913, the defendant, Fidelity Trust Company, filed its counter claim, called a cross-complaint, in said cause against the plaintiffs, Dora E. Rooker and William V. Rooker, and caused summons to be issued thereon, for, and served upon, said cross-defendants, who are the plaintiffs in this Bill of Complaint. In this cross-Complaint the Fidelity Trust Company reaffirmed its act of repudiation by declaring upon the trust agreement of October 11, 1909, as being a mortgage. The cross-complaint averred that the Fidelity Trust Company had made certain advancements to Dora E. Rooker on the security of the trust agreement, it demanded judgment for the amount of its claim and for the foreclosure of the trust deed as a mortgage, and for a decree of sale of the trust estate to pay the judgment to be rendered in the cause. Subsequently this counter claim was amended. In this amended cross-complaint the Fidelity Trust Company did not aver that it was trustee, but, describing its position in the case said that it was "a corporation organized under and pursuant to the laws of Indiana." The averments of the counter claim included that on the eleventh (11th) day of October, 1909 Dora E. Rooker was the owner in her own separate right and estate of certain described lands situate in Hamilton County, Indiana, said lands being the same lands heretofore described in Clause Number Six (6) of this Bill of Complaint, to which clause reference is hereby made for greater certainty; also, that on said day William V. Rooker and Dora E. Rooker were the owners as tenants

[fol. 32] by the entireties of certain described lands situate in Marion County, Indiana, said lands being the same lands heretofore described in Clause Number Seven (7) of this Bill of Complaint to which clause reference is hereby made for greater certainty; also, that in the course of the erection of a dwelling house on her Hamilton County land said Dora E. Rooker had become involved beyond her present means to pay and being then desirous of borrowing certain sums of money for the purpose of paying off existing debts and of completing the improvements which were then in process of construction and for the purpose of carrying on the business of said Dora E. Rooker which consisted in operating the farm lands hereinafter described, entered into a written contract wherein it was mutually agreed that the said cross-plaintiff, Fidelity Trust Company, should pay, and it did agree to pay the sums necessary to carry out the said purposes of Dora E. Rooker and such further sums as said Trust Company might deem necessary to protect its interest in the premises; that it was further agreed that said Trust Company should have and receive for its compensation a fee of One Hundred Fifty and no/100 Dollars (\$150.00) and a commission of two (2) per cent on all loans and advancements and on any and all moneys laid out and expended by it to protect its interest and to promote a true and better performance of its trust, together with interest on all such moneys at the rate of six (6) per cent per annum to be credited semi-annually to said cross-complaint, [fol. 33] Fidelity Trust Company, as a debit and charge against the said plaintiff, Dora E. Rooker, a copy of which contract was exhibited with the Complaint; that to secure the repayment of said moneys to cross-complaint, Dora E. Rooker, and her husband, William V. Rooker, executed their certain mortgage in form a warranty deed conveying said described lands which deeds were exhibited with the cross-complaint; "Said cross-complainant avers that while said deeds aforesaid were executed to the Fidelity Trust Company, trustee, that the same were intended to secure the money advanced by said Fidelity Trust Company and that all amounts advanced as herein set forth were advanced by the Fidelity Trust Company under the contract and agreement hereinbefore set out"; that certain described payments of money were made by cross-complainant under said contract; that plaintiffs are committing waste on said premises.

"Wherefore cross-plaintiff sues and demands judgment that the said deeds aforesaid be declared a mortgage, that an accounting be had and that the cross-plaintiff be given judgment against the plaintiff, Rora E. Rooker, for the amounts found due and owing the cross-plaintiff herein together with interest thereon from the dates of the payment thereof that the amounts so found due and owing cross-plaintiff be adjudged a lien against the real estate herein described and that cross-plaintiff have foreclosure of said mortgage against [fol. 34] said Dora E. Rooker and William V. Rooker and that said real estate or so much thereof as may be necessary for that purpose be sold in satisfaction of the amount found due by the Court; that a receiver be appointed to take charge of the real estate herein described during the equity of redemption and for all proper relief."

18. That said memorandum of trust agreement filed with said amended counter claim is the same memorandum of trust agreement recited heretofore in Clause Number Eight (8) of this Bill of Complaint to which clause reference is hereby made for greater certainty.

19. That the said indenture of conveyance of said Hamilton County real estate is the same indenture of conveyance recited heretofore in Clause Number Nine (9) of this Bill of Complaint, to which clause reference is hereby made for greater certainty.

20. That the said indenture of conveyance of said Marion County real estate is the same indenture of conveyance recited heretofore in Clause Number eleven (11) of this Bill of Complaint, to which clause reference is hereby made for greater certainty.

21. That upon the incoming of said amended counter claim divers pleas and motions were directed thereat challenging its interpretation and construction and the sufficiency of the facts therein stated to constitute either: (1) A cause of action in favor of said Fidelity Trust Company against these plaintiffs, therein named as defendants or: (2) A cause of defense in behalf of said Fidelity Trust [fol. 35] Company to the amended complaint of these plaintiffs, who were the plaintiffs in said suit. That said Hamilton Circuit Court heard and determined each of said pleas and motions and exceptions were duly reserved to the court's rulings to the end that they might thereafter be presented as they were in time presented for review to the Supreme Court of Indiana.

22. That thereafter issues were joined upon said amended complaint with answer in general denial and with special answers to which were filed replies; and in like manner issues were joined upon said amended counter claim. And upon the issues so joined said cause was submitted to the court for trial finding and judgment without the intervention of a jury.

23. On December 13, 1913, the trial court rendered judgment to the effect that the trust agreement was in fact and in law a mortgage, foreclosed the same and directed the sale of the trust estate by the sheriff as other lands are sold on execution to pay the judgment debt of Twenty-Three Thousand Two Hundred One and 44/100 Dollars (\$23,201.44). The appeal bond was fixed at Thirty Thousand and no/100 Dollars (\$30,000.00), and thirty (30) days' time was given. There was no supersedeas.

24. On May 15, 1914, the Fidelity Trust Company, having purchased the American Central Life mortgage on the Hamilton County farm in further repudiation of said trust agreement and renunciation of said office of trustee sued Dora E. Rooker and William V. Rooker in said Hamilton Circuit Court to foreclose said mortgage. Said suit to foreclose said mortgage never came to judgment in favor of said Fidelity Trust Company, but said suit was dismissed.

25. On June 8, 1915, the Sheriff of Marion County, in consideration of Four Thousand and no/100 Dollars (\$4,000.00) paid by

credit on the judgment rendered in said Cause Number 16338 in said Hamilton Circuit Court, executed his deed in statutory form, conveying the lands of the trust estate in Marion County to the Fidelity Trust Company, purchaser thereof at sheriff's sale, in disregard of the valuation of said lands at Eighteen Thousand and no/100 Dollars (\$18,000.00) and in further repudiation of said trust agreement and renunciation of said office of trustee.

26. On September 28, 1915, the Sheriff of Hamilton County, in consideration of Twenty Thousand Eight Hundred Sixty-Four and 14/100 Dollars (\$20,864.14), paid by credit of balance in full of the judgment rendered in said Cause Number 16,338 in said Hamilton Circuit Court executed his deed in statutory form, conveying the lands of the trust estate in Hamilton County to the Fidelity Trust Company, purchaser thereof, at sheriff's sale, in disregard of the valuation of said lands at Sixty-Five Thousand and no/100 Dollars (\$65,000.00) and in further repudiation of said trust agreement and renunciation of said office of trustee.

[fol. 37] 27. On October 5, 1915, the Supreme Court of Indiana reversed the judgment of the Hamilton Circuit Court, rendered on December 13, 1913 in said Cause Number 16,338 in said Hamilton Circuit Court, the Supreme Court holding that the instruments in issue were a trust agreement and not a mortgage, and that as such trust contract was controlled with the law of trusts.

The mandate of the Supreme Court of Indiana on that appeal was: "The judgment of the trial court in the case at bar is contrary to law and must be set aside. Judgment reversed with instructions to sustain appellant's separate and several motions for a new trial and for further proceedings in accordance with this opinion."

The text of the opinion of the Supreme Court of Indiana on this appeal was as follows:

"SPENCER, C. J.: On October 11, 1909, appellants, Dora E. Rooker and William V. Rooker, as first parties and the appellee, Fidelity Trust Company, as second party, entered into a certain trust contract and executed as evidence of such contract the following memorandum in writing, omitting the formal parts:

"Witnesseth:

"Paragraph 1. That concurrently herewith and as part of the contract evidenced by this memorandum, the said first parties have this day by their certain written instruments in the form of a general warranty deed, conveyed to the second party as trustee, even [fol. 38] upon the conditions and trust and for the uses and purposes herein more particularly set forth, the following real estate in Marion County, in the State of Indiana, to-wit: (Here follows description of same.)

"Also the following real estate in Hamilton County, in the State of Indiana to-wit: (Here follows description of same.)

"That reference is hereby made to the said warranty deed and the several descriptions therein for greater certainty.

"Paragraph 2. That said warranty deed is made ever upon the conditions and trust and upon the powers and for the uses and purposes more particularly set forth, that is to say:

"Whereas the said Dora E. Rooker, the grantor in said deed and first party herein is the owner in her own and separate right and estate of the said above described land situated in said Hamilton County and the said Dora E. Rooker, and William V. Rooker, her husband, grantors in said deed, and parties of the first part, are the owners as tenants by the entireties of said real estate situated in said Marion County, and

"Whereas the said Dora E. Rooker in and about the improvement of her said real estate in Hamilton County, Indiana, has heretofore undertaken to erect and construct a dwelling house and outbuildings appurtenant thereto and other necessary and proper structures and to equip the same with modern utilities and conveniences and [fol. 39] in so doing has been obliged to lay out and expend large sums of money and has been obliged to incur obligations beyond her reasonable expectations and beyond her present means to pay, and

"Whereas, the said improvements have been carried so far toward completion as that they cannot now be abandoned or the work thereon stopped or delayed without great sacrifice and loss to the said Dora E. Rooker and without great injury to her estate, and

"Whereas, it requires Six Thousand and no/100 Dollars (\$6,000.00) to complete said improvements and to pay off indebtedness of said Dora E. Rooker incurred by her arising out of the making of the said improvements and in the completion and installation thereof, and said Dora E. Rooker represents that all such indebtedness was incurred by her for her own benefit arising out of the making of said improvements.

"Now, therefore, it is agreed that the said Fidelity Trust Company, second party herein, shall and it does accept the title of, in and to said real estate ever upon the conditions and trust and upon the powers and for the uses and purposes following, that is to say:

"Clause A. The Fidelity Trust Company shall pay and it does hereby agree to pay from time to time upon the written order and direction of said Dora E. Rooker not exceeding the sum of Six Thousand and no/100 Dollars (\$6,000.00) for and on account of the erection and construction of said dwelling house, outbuildings and [fol. 40] improvements and the equipment and installation thereof, it being expressly understood and agreed that if a part of said indebtedness is held or may hereafter be held by banks on account of advancements made and which may hereafter be made to said Dora E. Rooker, or to the said William V. Rooker, as the undisclosed principal of said Dora E. Rooker, it is ever understood and agreed that the written order and direction of the said Dora E. Rooker that an indebtedness be paid for her use and benefit, notwithstanding the form of said indebtedness, shall be forever binding and conclusive on all parties concerned that such debt or debts so ordered to be paid is and are in fact and in law the debts of the said Dora E. Rooker, any evidence to the contrary notwithstanding.

"Clause B. The said Fidelity Trust Company may let out and expend any such sum or sums of money other than those above specified in Clause A of this paragraph as said Trust Company may deem necessary to protect its interest in and to said real estate and to perform or better promote the performance of the trust herein and hereby created and every such advancement or payment so made shall be deemed and taken to be the debt of the said Dora E. Rooker as fully as if the same were made upon her express written direction.

"Clause C. That the said Fidelity Trust Company may obtain or cause to be obtained from any bank or banks upon the promissory note or notes of the said Dora E. Rooker and such sum or sums of [fol. 41] money, whether within or in excess of the sum of Six Thousand and no/100 Dollars (\$6,000.00) as may be necessary to the true and better and complete performance of this contract and to the successful maintenance of and care for said real estate and the business thereon conducted.

"Clause D. Said Fidelity Trust Company is hereby appointed, empowered and authorized as the true and lawful attorney-in-fact of the first parties and in their separate deed, joint name, place, right and stand to execute a deed of general warranty conveying said real estate or any part or parts thereof upon the limitations herein stated and provided.

"Paragraph 3. Said Fidelity Trust Company shall have and receive for its compensation, trustee's fee of One Hundred and Fifty and no/100 Dollars (\$150.00) and a commission of two (2) per cent on all loans and advancements and on any and all moneys laid out and expended by it to protect its interest or to promote the true and better performance of this trust, together with interest on all such moneys at the rate of six (6) per cent per annum, to be credited semi-annually to said Fidelity Trust Company as a debit and charge against said Dora E. Rooker and said Fidelity Trust Company shall be entitled to have and receive the usual real estate commission on all or any part of said real estate sold by said Fidelity Trust Company, pursuant to this agreement and said Fidelity Trust Company shall be entitled to have and receive a brokerage fee of one-eighth ($\frac{1}{8}$) of one (1) per cent of all moneys obtained from any bank to the credit of said Dora E. Rooker on her paper originally made.

[fol. 42] "Paragraph 4. It is further ever understood and agreed that at any time within one (1) year after the date of these presents said second party may execute and perform so much of the power to sell and convey, as is hereinbefore granted, as pertains to said Marion County real estate provided always that the sum received in consideration therefor shall be net to the credit of said Dora E. Rooker Eighteen Thousand and no/100 Dollars (\$18,000.00) after the payment of the commission hereinbefore mentioned. Should it so happen that said Marion County real estate be not sold within said period of one (1) year for said sum of Eighteen Thousand and no/100 Dollars (\$18,000.00) plus commission, then after ninety (90) days' notice in writing to be given to first parties by second party, the

said second party may publicly advertise said Marion County real estate and sell the same at whatever sum it may bring and if said Marion County real estate does not sell for lack of a bid, then second party may upon ninety (90) days' notice in writing to be given to the first parties by the second party, sell and convey said Hamilton County real estate for whatever it will bring over and above the set price or Sixty-five Thousand and no/100 Dollars (\$65,000.00). If said Hamilton County real estate does not sell for said sum of Sixty-five Thousand and no/100 Dollars (\$65,000.00) for lack of a bid of that sum, then the said second party hereto may publicly advertise and sell said Marion County real estate after ninety (90) days' notice [fol. 43] given in writing to first parties by second party at public auction for whatever sum and price said real estate may bring. And if said Marion County real estate upon such sale do not fetch enough to pay the moneys and perform the obligation herein charged upon and against said real estate, then said second party may proceed to sell, and sell, said Hamilton County real estate in the manner and form prescribed as to said Marion County real estate, after thirty (30) days' notice given in writing to first parties by second party.

"It is ever understood and agreed that said Fidelity Trust Company shall apply the proceeds of any sale or sales of said real estate made pursuant to this agreement, as follows:

"(1) To the payment of any mortgage or other valid lien, charge, adverse interest or incumbrance upon and against said real estate, or any part of any of the real estate herein described, which may be prior and superior and adverse to the interest of said Fidelity Trust Company.

"(2) To the payment of moneys advanced by second party to first parties or paid to the use and benefit of first parties as herein authorized and provided.

"(3) To the payment of moneys obtained by said second party from any bank or banks to the use and benefit of said Dora E. Rooker upon her paper as hereinbefore authorized and provided.

"(4) The rest and residue of any money shall be paid to the [fol. 44] said Dora E. Rooker, her heirs, executors, administrators and assigns.

"Paragraph 5. It is further understood and agreed that any and every deed of conveyance executed by second party pursuant to the provisions of this contract shall convey to the grantee therein named an absolute and unqualified estate as fully and completely as if such deed were made by the said first parties in their own proper persons, names and rights. And the said first parties do now hereby ratify, approve and confirm any and every such deed made by second party pursuant to this memorandum and in execution of the powers and upon the trust and confidence herein and hereby imposed.

"Paragraph 6. In execution whereof the several parties hereto do hereby forever bind themselves, their heirs, executors and assigns."

"Contemporaneously with the execution of the above memorandum and as part of the same transaction, appellants executed to the Fidelity Trust Company, as trustee, two (2) indentures in the form of

warranty deeds, in which the real estate referred to in the above memorandum was conveyed to said trustee on terms and conditions. The deed to the Hamilton County lands provided that the Trust Company should hold said real estate

"in trust for the use and benefit of said Dora E. Rooker and to protect and discharge the obligations arising out of claims and liens or the right to liens by reason of improvements made on the above described real estate.

[fol. 45] "Said Fidelity Trust Company of Indianapolis, Indiana, as aforesaid, to sell and convey said lands or any part of them at such prices and upon such terms as may be, from time to time, dictated in writing by said Dora E. Rooker; to execute the proper trustee's deed or deeds conveying the title thereto in fee simple to the purchaser; it being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis, shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as this grantor could herself do, and any such purchaser or purchaser shall in no wise be responsible for the application of the proceeds arising from such sale in the hands of said Fidelity Trust Company of Indianapolis, Indiana.

"And said Fidelity Trust Company of Indianapolis, Indiana, as such trustee, shall have full power and authority to make contracts in writing for the sale of the foregoing real estate, or any part or all of said real estate and convey same free and clear of any incumbrance, or convey the same subject to any existing incumbrances, and to do any and all acts and to execute any and all papers which may be necessary to protect the interests of this grantor, the mortgagee and other lienholders in and to said real estate and to conserve the trust hereby created.

"And in the event any liens or charges against said real estate by paid by the Fidelity Trust Company, trustee, the said Fidelity Trust [fol. 46] Company, trustee, shall be subrogated to all the rights of such original lienholders and the same shall be enforceable by it and collectible with interest at the rate of six (6) per cent. per annum, to be credited semi-annually as a debt and charge against said real estate."

The deed to the Marion County lands provided that the Trust Company should hold said real estate "in trust for the use and benefit of said grantors, William V. Rooker and Dora E. Rooker, and to protect and discharge the obligations of the trust herein with the powers and limitations as follows:

"Said Fidelity Trust Company of Indianapolis, trustee, as aforesaid, to sell and convey said real estate according to the terms of a certain contract of even date herewith, within one (1) year after the date of these presents for a consideration fixed in said contract, and should it so happen that said real estate be not sold within the said period of one (1) year, for the sum nominated in said contract, then after ninety (90) days' notice in writing to be given to the grantors by the trustee herein, the trustee may publicly advertise said real

estate and sell same at public or private sale at such price as it may bring and upon the consummation of such sale as may be made by said Fidelity Trust Company of Indianapolis as such trustee to execute the proper trustee's deed conveying the title thereto in fee simple to its said purchasers, it being hereby understood and agreed that any deed so executed by said Fidelity Trust Company [fol. 47] of Indianapolis, trustee, shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as these grantors could themselves do, and any such purchaser or purchasers shall in nowise be responsible for the application of the proceeds arising from such sale in the hands of the said Fidelity Trust Company of Indianapolis, trustee, but said Fidelity Trust Company is directed to apply the proceeds arising from such sale in the manner and for the purposes set out in the contract entered into between said grantors and said Fidelity Trust Company, trustee, on this date.

"The said Fidelity Trust Company of Indianapolis, as such trustee, shall have full power and authority to make contracts in writing for the sale of the foregoing real estate or any part or all of said real estate and convey the same free and clear of any incumbrance or subject to any existing incumbrances, and to do any and all acts and to execute any and all papers which may be necessary to protect the interests of the grantors in and to said real estate and to conserve the trust hereby created and it is hereby further understood and agreed that if the said Fidelity Trust Company of Indianapolis, as trustee, shall elect to pay any lien, charge or incumbrance existing against said real estate, the said Fidelity Trust Company of Indianapolis, trustee, shall be subrogated to all the rights, title and interest held by the original parties thus paid and the same shall be collectible and enforceable in its hands, together with interest thereon at the rate of six (6) per cent, per annum to be credited semi-annually to said Fidelity Trust Company as a debit and charge against the grantors and the real estate above described."

"Each conveyance was made subject to unpaid taxes and to certain described mortgages.

"On October 30, 1912, appellants brought an action in the Marion Circuit Court against appellee, in which they charged a violation of the trust agreement, and asked for an accounting and for the appointment of a receiver to carry out the trust embodied in said contract. Later the cause was venued to the Hamilton Circuit Court where appellants filed an amended complaint in which the firm of Lilly and Stalnaker, the Illinois Surety Company, the Balke & Krauss Company, and one Daniel I. Neher were joined as party defendants to answer as to their respective interests in the premises, if any. Of these defendants, Lilly and Stalnaker and the Illinois Surety Company filed disclaimers, and Neher was subsequently defaulted, while the interest of the Balke & Krauss Company, represented by a judgment against the Hamilton County real estate, was found on final hearing to have been assigned to appellee and said judgment was merged in the judgments in this cause.

"Appellee entered a general denial to the amended complaint and also filed an amended counter claim, denominated a cross-complaint, in which it alleged the payment of large sums of money by it in accordance with the terms of the trust agreement and for the pro-[fol. 49] tection of its rights thereunder. It further charged waste on the part of appellants and asked that an account be had; that the deeds above described be declared a mortgage and foreclosed; and that a receiver be appointed to take charge of the property during the year of redemption. We deem it unnecessary to make extended reference to the several motions addressed by appellants to this pleading, nor to the ten (10) paragraphs of special and partial answer filed thereto. It is sufficient to say in general: (1) That they present appellants' theory that the instruments above set out constitute a trust agreement which, it is charged, has been violated and abused in the particulars set forth; and (2) that they oppose the position taken by appellee that the conveyance, while in form of trust deeds, in fact constitute a mortgage which was executed as security for the repayment of advancements made by it. The issues were closed with an answer of general denial to the counter-claim and with a reply in denial to the several paragraphs of special and partial answer filed by appellants. The cause was tried by the court which, at request of appellants, made a special finding of facts and also a general finding, in which it found against appellants on the issues presented by their amended complaint and in favor of appellee on the issues joined on its amended counter-claim.

"The court thereupon rendered judgment, foreclosing the mortgage and directing a sale of the property in question, and at the same [fol. 50] time rendered personal judgments which determined the matter of costs as between the Illinois Surety Company, Lilly and Stalnaker, Daniel I. Neher, and appellants. None of the parties last above mentioned, other than appellants, is now before this court and as this is a vacation appeal, appellee insists that it should be dismissed without an inquiry into the merits for the reason that all the parties to the judgment below are not named in the assignment of errors in this court. This appeal, however, is from the judgment in rem rendered on the issues which involve the construction of the instruments herein set out and does not question the personal judgments which determined only certain matters of costs. No parties, other than appellants and appellee, are affected by the judgment form which this appeal is prosecuted, and they are the only necessary parties to the proceeding.

Zimmerman v. Gaumer (1898), 152 Ind. 552, 554, 53 N. E. 829;

Lowe v. Turpie (1896), 147 Ind. 652, 692; 44 N. E. 25; 47 N. E. 150; 37 L. R. A. 233.

"The principal question to be determined here is the proper construction to be given to the instruments which are made the basis of this action. In support of its contention that the deeds in question in fact constitute a mortgage, appellee relies on the following propositions of law:

"(1) That different instruments, executed at the same time, relating to the same matter constitute one transaction and must be read and construed together.

[fol. 51] Knepper v. Eggiman (1911), 177 Ind. 56, 62; 97 N. E. 161;

Schmueckle v. Waters (1890), 125 Ind. 265, 267; 25 N. E. 281.

"(2) That any conveyance of real estate, whatever its form, which is in fact executed for the purpose of securing a debt is a mortgage.

Sinclair v. Gunsenhauser (1912), 179 Ind. 78, 121; 98 N. E. 37; 100 N. E. 376;

Brown v. Follette (1900), 155 Ind. 317, 321; 58 N. E. 197; Lowe v. Turpie, supra.

"(3) That the power of sale contained in the instruments here involved does not exclude the right of foreclosure by judicial proceeding.

Sinclair v. Gunsenhauser, supra;

Eaton, Etc., R. Co. v. Hunt (1863), 20 Ind. 457, 461; Sec. 4029 Burns R. S. 1914; Sec. 2986 R. S. 1881.

"There can be no doubt that the general rule which precludes the admission of parol or extrinsic evidence to vary or contradict the terms of a written instrument is subject to the exception that a deed absolute on its face may, in equity, be shown by parol evidence to have been intended to have the effect of a mortgage merely. This exception has found frequent expression in the decisions of this and the appellate court, and its existence as an established rule is conceded by appellants. It is their contention, however, that it has no application where, as in this case, the deed or other instrument of conveyance is but one element in a transaction which has been reduced to writing in its entirety and is evidenced by a memorandum embodying all of its terms. This position is well taken. As recently stated by this court, where there is a formal written contract which [fol. 52] appears to be complete within itself, it will be presumed to be the repository of the final intentions of the parties in regard to the subject matter of this agreement. Oral declarations relative thereto will be disregarded and the rights of the parties determined as they appear from the written instrument.

Strebel v. Bligh, 183 Ind. 537; 109 N. E. 45.

"The instruments now before us embody but one contract, the terms of which are stated in the memorandum above set out, and the legal force and effect of the trust deeds, as they are termed, depend upon the intention of the parties as it is evidenced by said memorandum. From the terms of this instrument, there can be no doubt that it was one purpose of appellants to provide therein for the repayment to appellee of such sum or sums as it should advance to them or expend in their behalf. To that extent the instruments may

be construed as affording security to appellee for money advanced, but not every instrument which affords security is a mortgage, nor is it the primary or sole purpose of the contract in this case to insure the payment of appellees' claim and no others. Appellees were the owners of a considerable amount of real estate, on a part of which certain improvements were contemplated and were in fact under course of construction. The expense of these improvements proved greater than was anticipated and the claims of creditors were being pressed. It became evident that to prevent great sacrifice or loss to [fol. 53] the estate, provision had to be made for the completion of the work in hand, for the proper maintenance of the property until disposed of and for the payment of debts owing by appellants. To that end the agreement evidenced by the instruments here in suit was entered into and all parties thereto obligated themselves, their representatives and assigns, to the proper performance of its terms. The evident purpose of its execution and the language used by the parties makes it clear that at the time it was entered into the agreement was treated as a trust and not as a mortgage.

"Reference may here be made to the cases of *Taylor v. Cornelius* (1869), 60 Pa. St. 187, and *Woodruff v. Robb* (1850), 19 Ohio 212, to which our attention is called by appellee as decisive of the questions here presented. Without reviewing these decisions at length, it may be noted that in each case the instruments in suit contained a condition of defeasance which provided, in substance, that on payment of certain debts, the property or so much as remained thereof should be reconveyed to the grantor in the trust deed. In the case at bar, no provision is made for the reconveyance to appellants of the real estate involved or any part thereof. The fair construction of the instruments before us is that an effort on the part of appellants to provide for the conversion of their property into money in order that their just debts might be paid. As such it is a contract governed by the law of trusts. True, provision is made for the advancement [fol. 54] of certain sums of money by appellee to appellants or on their order, but it is apparent that the advancement so made do not supply the entire consideration for the execution of the contracts and they are to be included among debts to be paid out of the funds realized from the sale of the lands in question. If, by reason of the improvements contemplated or other circumstances, the proceeds realized from the sale of said lands be more than sufficient to pay all obligations, then the residue of such proceeds is to go to appellant, Dora E. Rooker, her heirs and assigns. To that extent they may be said to possess an equitable interest in the estate and their position with reference thereto is somewhat analogous to that of other creditors, but nowhere in the instruments of conveyance is there a contingency expressed or implied, on the happening of which appellants, or either of them, would be entitled to a reconveyance of any part of said lands.

"The distinction between an absolute deed of trust and a deed of trust in the nature of a mortgage is clearly stated in *Hoffman v. Burneston & Co. v. Mackall* (1885), 5 Ohio St. 124, 64 Am. Dec. 637, and the decision in that case supports our construction of the

instruments here in controversy. We quote from the opinion (p. 130) as follows: "There is a manifest and well settled distinction between an unconditional deed of trust, and a mortgage or deed of trust in the nature of a mortgage. The former is an absolute and indefeasible conveyance of the subject matter thereof, for the purpose expressed; whereas the latter is conditional and defeasible. A mortgage [fol. 55] is the conveyance of an estate, or pledge of property, as security for the payment of money, or the performance of some other act, and conditioned to become void upon such payment or performance. A deed of trust in the nature of a mortgage is a conveyance in trust by way of security, subject to a condition of defeasance, or redeemable at any time before the sale of the property. A deed conveying land to a trustee as mere collateral security for the payment of a debt, with the condition that it shall become void on the payment of the debt when due, and with power to sell the land in case of a default on the part of the debtor, is a deed of trust in the nature of a mortgage. By an absolute deed of trust, the grantor parts absolutely with the title, which rests in the grantee unconditionally, for the purpose of the trust. The latter is a conveyance to a trustee for the purpose of raising a fund to pay debts, while the former is a conveyance in trust for the purpose of securing a debt, subject to a condition of defeasance. The court concludes in language applicable here, that it 'is manifest from this distinction that the conveyance in controversy in this case was not a mortgage or deed of trust in the nature of a mortgage but an absolute deed of trust.'

"The judgment of the trial court in the case at bar is contrary to law and must be set aside. Judgment reversed, with instructions to sustain appellants' separate and several motions for a new trial, and for further proceedings in accordance with this opinion."

Rooker v. Fidelity Trust Co., 185 Ind. 172, 181-188.

[fol. 56] 28. And plaintiffs say and would show unto the court that in and by said opinion and mandate of said Supreme Court the State of Indiana forever fixed and determined the obligation of said trust agreement, and allocated to said obligation all the remedies and processes of the law of said State which forever should attend the obligation of said contract; and that having in the manner and form aforesaid allocated to said obligation all the remedies and processes of law of said State which should attend the obligation of said contract, said State thereby and at the same time withdrew said obligation from the further inquiry and determination of all the courts of said State and thereby and at the same time so fixed and determined the law of said State to be such that no issue de novo concerning said contract and its obligation would thereafter be within the jurisdiction of any court of said State and that should any issue de novo be attempted to be made concerning said contract and its obligation in any court of said State such proceeding would be coram non jure and void. And plaintiffs say and would show unto the court that in and by said opinion and mandate said Supreme Court remanded said cause to said Hamilton Circuit Court for the sole purpose of tak-

ing further proof upon the issues joined and for no other purpose whatsoever and that no other purpose than the taking of further proof upon said issue was within the jurisdiction of any court of said State and said jurisdiction was by law confined solely and exclusively to said Hamilton Circuit Court.

[fol. 57] 29. And plaintiffs further say and would show unto the court that after the execution of said contract and after the same had become the subject of pending litigation the State of Indiana enacted a statute entitled, "An Act concerning proceedings in civil and criminal cases" approved March 15, 1913. (Acts 1913 P. 850; 1 Burns R. S. 1914 Sec. 343 A); that on March 5, 1915, there was approved an act of the General Assembly of Indiana, entitled, "An Act to amend an act, entitled 'An act concerning proceedings in civil and criminal cases,' approved March 15, 1913."

This amended act in so far as it is germane here is as follows:

"Sec. 1. That hereafter in all pleadings, papers, or writings which are filed in or before any court in any civil * * * case, or in any proceedings of any kind where the sufficiency of the same can may be or is called in question, that all recitals therein, and all statements contained in any participial expression or following the word 'having' or 'being' shall be considered and held to be allegations of fact whenever necessary to the sufficiency thereof, and all conclusions stated therein shall be considered and held to be the allegation of all the facts required to sustain said conclusion when the same is necessary to the sufficiency of such pleading, paper or writing. Provided, That as against such conclusions only the following remedy is given, that a motion may be made to require the party filing such pleading, paper or writing to state the facts necessary to sustain the conclusion [fol. 58] alleged, said motion setting out wherein such pleading, paper or writing is insufficient. If no such motion is made and ruled upon, all objections on account thereof are waived.

(Indiana Acts 1915, p. 123; 5 Burns R. S. 1921, Sec. 343a.)

30. And plaintiffs say and would show unto the court that unto the approval of said Amended Act of the General Assembly of the State of Indiana, of March 5, 1915 it was the law of Indiana concerning appeals that "Appeals may be taken from the Circuit Court * * * to the Supreme Court, by either party, from all final judgments, except in actions originating before a Justice of the Peace or Mayor of a city where the amount in controversy, exclusive of interest and cost, does not exceed Fifty Dollars (\$50.00); Provided, however, That this exception shall not apply to prohibit an appeal in cases originating before a Justice of the Peace or a Mayor of a city involving the validity of an ordinance passed by an incorporated town or city. The party obtaining judgment shall not appeal after receiving any money paid or collected thereon."

31. And plaintiffs say and would show unto the court that unto the approval of said amended act of the General Assembly of the State of Indiana, of March 5, 1915, it was the law of Indiana that on appeal to the Supreme Court where "the judgment is reversed in whole

or in part the Supreme Court shall remand the case to the court below, with instructions for a new trial, where the justice of the case requires it; but if no new trial is required, with particular instructions relative to the judgment to be rendered and all modifications thereof."

32. And plaintiffs say and would show unto the court that until the approval of said Amended Act of March 5, 1915, it was the law of Indiana that on appeal to the Supreme Court that Court "may reverse or affirm the judgment below in whole or in part and remand the cause to the court below, but the Supreme Court shall not reverse the proceedings further than to include the first error."

33. The plaintiffs say and would show unto the court that until the approval of said Amended Act of March 5, 1915, it was the law of Indiana that the jurisdiction of a circuit court upon a mandate from the Supreme Court was limited to the instructions and directions given to the Circuit Court in the opinion of the Supreme Court and that the re-examination in the Circuit Court of matters determined in the opinion and judgment of the Supreme Court was a subject coram non judice, and any action thereon by said Circuit Court would be and was beyond the jurisdiction of said Circuit Court and void.

34. And plaintiffs say and would show unto the court that until the approval of said Amended Act of March 5, 1915, it was the law of Indiana that the Supreme Court was without process and without authority to re-examine its own opinion after mandate and after such mandate had been received and acted upon by the parties in the court to which such mandate was directed.

35. And plaintiffs say and would show unto the court that until the approval of said Amended Act of March 5, 1915, it was the law [fol. 80] of Indiana that a Circuit Court was without process and authority to stay, avoid or annul the execution of a mandate of the Supreme Court and that any attempt by a Circuit Court to stay, avoid or annul the execution of a mandate of the Supreme Court was coram non judice and any judgment therein was void.

36. And plaintiffs say and would show unto the court that until the approval of said Amended Act of March 5, 1915, it was the law of Indiana that the Supreme Court of the State could not make valid and lawful a judgment of a Circuit Court of the State which was void.

37. And plaintiffs say and would show unto the court that said Amended Act as interpreted and construed by the courts of Indiana in this case, impairs the obligation of said trust agreement by allowing the Fidelity Trust Company to plead its own conclusions instead of the facts, all to the end that false interpretations may be and are substituted in the place and stead of the truth and that the facts in the premises may be and are wholly disregarded; and in this particular said Fidelity Trust Company was permitted to substitute its conclusion in the place of the truth as to the (1) the meaning of said trust agreement; and (2) as to the facts which should constitute and did constitute performance thereof; and (3) as to the remedies and processes of law which legally and rightfully should attend the

enforcement of said trust agreement; and (4) as to the meaning and effect of said opinion, mandate and judgment of the Supreme Court [fol. 61] of Indiana reversing said judgment of said Hamilton Circuit Court; and (5) as to the remedies and processes of law which legally and rightfully should attend the enforcement of said opinion and judgment; that each and all said conclusions of said Fidelity Trust Company were by it imposed upon and adopted by the courts of Indiana in the procedure in said Cause Number 16338 after said decision on appeal by said Supreme Court; that each of said conclusions was wholly false; that by reason of the premises the truth and the facts in respect of said trust agreement were suppressed and never were heard and determined in and by said courts of Indiana after said judgment of reversal, and by reason thereof said Statute impaired the obligation of said trust agreement in contravention of Article I, Section 10 of the Constitution of the United States and these petitioners were denied the equal protection of the law and their property was taken without due process of law, all in contravention of the Fourteenth Amendment of the Constitution of the United States; that by reason of the premises all the proceedings and judgments of said courts of Indiana following said judgment of reversal by said Supreme Court of said judgment of said Hamilton Circuit Court are unlawful and void and they should be so declared and adjudged in this action.

38. And plaintiffs say and would show unto the court that until the approval of said Amended Act of the General Assembly of the State of Indiana, of March 5, 1915, it had been and was the law of Indiana that an executory contract when reduced to a cause of action of which a court had assumed jurisdiction, ceased eo instante to re-[fol. 62] main executory and so became actionable as that in the circumstances of the case; (1) there arose in favor of the party not in default an action on the contract; or (2) there arose in favor of the party not in default an action as on the quantum meruit; or (3) there arose in favor of the party in default an action as on the quantum valebat to recover the value of benefits received and accepted in excess of damages sustained because of the breach of such contract. But nowhere in the law of Indiana, until the approval of said statute, was there any authority to the effect that a contract could be concurrently executory and actionable and particularly was there no authority in the laws of Indiana to the effect that a contract once adjudged to be in action because of a breach of its obligation, could remain and continue to be executory and performable in pais with the right outstanding that any subsequent acts in pais could create thereafter any right of action or action de novo on said contract.

39. And plaintiffs say and would show unto the court that until the approval of said Amended Act of March 5, 1915, it had been and was the law of Indiana that (1) in the absence of fraud, accident or mistake set forth in a suit to reform the instrument the terms of a written contract could not be varied with parol evidence; (2) that a written contract exhibited with a pleading controlled the averments of the pleading and struck down all such averments as were

in conflict with the terms of the contract; (3) that a written contract recited in a special finding of facts controlled the findings and [fol. 63] struck down all recitals therein which were inconsistent with the terms of the contract.

40. And plaintiffs say and would show unto the court that until the approval of said Amended Act of March 5, 1915, it had been and was the law of Indiana that in an action on a contract the party asserting any right thereunder must recover on the single and definite theory of his complaint, *secundum allegata et probata*, or not at all.

41. And plaintiffs say and would show unto the court that until the approval of said Amended Act of March 5, 1915, it had been and was the law of Indiana that one who had heretofore repudiated a contract should not thereafter be heard upon a right to reinstate said contract as executory, unless and until he who asserted such claim of right should first offer to do equity and offer compensation for the wrongs which had arisen out of such act or acts of repudiation.

42. And plaintiffs say and would show unto the court that until the approval of said Amended Act of March 5, 1915, it had been and was the law of Indiana that the cestui que trust of a trust estate was in equity the owner thereof, and that such ownership could not be divested nor impaired with any act of the trustee inconsistent with the terms of the trust.

43. And plaintiffs say and would show unto the court that until the approval of said Amended Act of March 5, 1915, it was the right and the duty of a cestui que trust upon an act of repudiation or a breach of duty by the trustee to sue (1) for the recovery of damages [fol. 64] arising out of such act of repudiation or breach of duty by the trustee; and (2) to redeem the trust estate from the offending trustee; and (3) to have an accounting of the interest of the trustee, if any, with a declaration and adjudication by the court of the terms and conditions of the redemption of the trust estate by the cestui que trust from the offending trustee; and (4) to have the trust estate cared for and preserved by a receiver pending the process of accounting, distribution and redemption.

44. And plaintiffs say and would show unto the court that until the approval of said Amended Act of March 5, 1915, it had been and was the law of Indiana that where one court had jurisdiction of the parties and the subject matter of an action at law or a suit in equity all other courts were without jurisdiction of said parties and said cause and that where in the presence of a vested jurisdiction another and different court attempted to assume jurisdiction of said parties and subject matter the proceedings in such subsequent court were *coram non iudice* and void.

45. And plaintiffs say and would show unto the court that until the approval of said Amended Act of March 5, 1915, it had been and was the law of Indiana that an action in contract and an action sounding in tort could not at one and the same time be maintained in one and the same cause but that upon the facts the party should elect his remedy whether in contract or in tort and that such election once made was conclusive and irrevocable; also, that an action for an

[fol 65] accounting was an action in contract and that an action to quiet title was an action in tort and that said actions could not be prosecuted and maintained concurrently in the same cause.

46. And plaintiffs say and would show unto the court that on June 27, 1917, and notwithstanding the fact and the law that further jurisdiction of said Hamilton Circuit Court, in the premises then and there was acquired, vested and limited wholly and solely upon and by the said mandate of said Supreme Court and notwithstanding said mandate directed and required only the taking of further proof, on the retrial of the case upon issues joined and determined said Fidelity Trust Company reappeared in said Hamilton Circuit Court and thereafter suing in a dual capacity which it described as "Fidelity Trust Company in its corporate capacity proper and as trustee" filed its pretended second amended counter claim and supplement thereto wherein it was averred that said Fidelity Trust Company was the owner in fee simple of the lands of said trust estate; that these petitioners were claiming an interest in the Hamilton County lands of said trust estate; that said claim was unlawful and without right; that said claim was an unlawful cloud upon the said title of said trust estate and should be removed; that in and by the judgment of the Marion Circuit Court said claim of these petitioners to an interest in said Marion County lands had been adjudged to be wrongful and unlawful and these petitioners had been restrained and enjoined forever from asserting any interest whatsoever in said real estate of said trust estate; the prayer of said counter claim included that the title of said Trust Company be quieted as against the claim of these petitioners to any interest in said trust estate and that these petitioners be restrained and enjoined forever from asserting any interest therein; that along with said counter claim said Fidelity Trust Company filed a bill of particulars of moneys laid out and expended to the use and benefit of said trust estate and upon which said Trust Company demanded judgment against said trust estate; that said Fidelity Trust Company in its "corporate capacity proper and as trustee" exhibited with said counter claim the said trust agreement and trust deeds and averred that said "Fidelity Trust Company in its corporate capacity proper and as trustee" had fully performed all the conditions of said contract on its part to be performed, prior to the bringing of said suit.

47. And plaintiffs say and would show unto the court that on May 28, 1915, suit was begun in the Marion Circuit Court of Indiana against George V. Coffin as Sheriff and the Fidelity Trust Company as purchaser upon execution sale, to quiet plaintiffs' title as cestui que trustents to the Marion County lands of said trust estate as against the cloud thereon placed by defendants in making said sale of said land under the decree of the Hamilton Circuit Court in said Cause Number 16,338, in the foreclosure of said trust deed as a mortgage; that said suit was in no respect whatsoever an action on said trust agreement as a contract then and there remaining executory in the interest and behalf of said defendants; that said cause in said Marion Circuit Court was Number 25,260 and by that number it is hereby

[fol. 67] after mentioned; that on June 23, 1917, a new party was introduced in said Cause Number 25,260, viz; The Fidelity Trust Company as Trustee; that this appearance was the first appearance of said Trust Company as Trustee in the many years embraced within the period of this litigation; that said appearance embraced new counsel in the person of Charles E. Cox who had been a member of the Supreme Court of Indiana at the time of the rendition of the opinion and judgment of said Supreme Court in said cause; that at the incoming of said Fidelity Trust Company as Trustee it began its action with a complaint and summons against these petitioners; that said action sounded in tort; that in said complaint, denominated a cross complaint, it was averred that these petitioners unlawfully and without right were claiming to have an interest in said real estate; that said Trustee was the owner in fee simple of said real estate by purchase from these petitioners; that said purchase was absolute and unconditional; that said claim of these petitioners was an unlawful cloud upon the title of said Trustee in and to said real estate which cloud should be removed by the court and that these petitioners should be restrained and enjoined forever from asserting any interest whatsoever in and to said real estate; that upon the hearing and trial on said cross complaint it was considered and adjudged by said Marion Circuit Court that said cross complaint should be and it was sustained and the prayer thereof granted and it was further considered and adjudged that these petitioners were claiming an interest in said real estate and that said claim was unlawful and [fol. 68] without right, and that said trustee was the owner in fee simple of said real estate by purchase from these petitioners and that said purchase was absolute and unconditional, and that said claim of these petitioners was an unlawful cloud upon the title of said trustee in and to said real estate which cloud should be removed by the court and that these petitioners should be and they were restrained and enjoined forever from asserting any interest whatsoever in and to said real estate and judgment finally was awarded against these petitioners for the cost of said suit; that these petitioners duly prosecuted their appeal from said judgment to the Supreme Court of Indiana and the same is now pending on said appeal; that during all the time embraced in said proceedings in said Marion Circuit Court Louis B. Ewbank was the judge of said Marion Circuit Court and he is the same Louis B. Ewbank who is now a member of the Supreme Court of Indiana; that said proceedings and judgment of said Marion Circuit Court on said cross-complaint are wholly void for the reasons that (1) at that time the jurisdiction of the parties and the subject matter of said cause was in the Hamilton Circuit Court of Indiana and that such jurisdiction was sole and exclusive; (2) that said proceedings and judgment were in contravention of the opinion and mandate of the Supreme Court of Indiana in said cause; (3) because of a disqualifying interest of the Judge of said Marion Circuit Court which interest and the circumstances of its discovery are hereinafter more particularly set forth; that in and by said proceedings and judgment of said Marion Circuit Court the property of these

[fol. 69] petitioners was taken without due process of law and they were denied the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

48. And plaintiffs say and would show unto the court that in and by said second amended counter claim as supplemented said "Fidelity Trust Company in its corporate capacity proper and as trustee pleaded many falsehoods including that (1) in and by said trust agreement and deeds these petitioners had parted with all their interest in the real estate of said trust estate in Hamilton County; (2) that the claim of these petitioners to an interest in said real estate was unlawful and without right; (3) that said counter claimant had duly performed all the conditions of said contract on the part of said counter claimant to be performed; (4) that said counter claimant was entitled to any of the relief therein sought; that each and all said falsehoods were wholly without foundation in fact and in law except as said Amended Act of March 5, 1915, undertook and pretend to authorize the pleader to substitute in a pleading his own conclusions in the place and stead of facts recited in the contract at issue; that upon the incoming of said second amended counter claim as supplemented, these petitioners seeking to get the truth before the Court and to expunge false issues from the case, challenged said second amended counter claim as supplemented, (1) with motions to strike out; (2) with motions to make more specific; (3) with demurrers and (4) with answers but that each and all said challenges were overruled and denied; that the substance and effect of said respective challenges are hereinafter set forth to wit:

[fol. 70] On August 4, 1917, the plaintiffs severally moved the court for an order to require the defendant, Fidelity Trust Company to make more certain and specific as to each of the several particulars hereinafter respectively enumerated, its second amended counter claim * * * to wit:

"First. If it be true, as said counter claims says it is true, that the defendant 'has fully and duly performed all of the conditions on its part to be by it performed,' then state the facts which cause or excuse as the case may be, the delay on your part in closing up the affairs of said trust, during the time of which delay interest charges have accumulated against said trust estate, you say, in the aggregate to wit, Ten Thousand Dollars (\$10,000.00).

"Second. State the facts which cause, or excuse as the case may be, your failure to apply the proceeds of any sale or sales of said real estate made pursuant to said trust agreement as follows, to wit: (1) To the payment of any mortgage, or other valid lien, charge, advance interest or incumbrance upon and against said real estate or any part of the real estate herein described, which may be prior or superior and adverse to the interest of the Fidelity Trust Company; (2) To the payment of the money advanced by second party to the parties or paid to the use and benefits of first parties as in said trust agreement authorized and provided; (3) To the payment of monies obtained by said second party from any bank or banks to the use and benefit of said Dora E. Rooker upon her note as in said trust

agreement authorized and provided; (4) To the payment to said [fol. 71] Dora E. Rooker, her heirs, executors, administrators and assigns the rest and residue remaining of any money arising from the sale of said real estate.

"Third. State the facts which cause or excuse as the case may be, the maturity of the debt which you charge against the plaintiffs.

"Fourth. State the date on which matured, if at all, the debt which you charge against the plaintiffs.

"Fifth. State the facts which constitute the duty and necessity, if any, on your part to have employed attorneys, viz: Mr. Henry Seyfried and Messrs. Kane and Kane, on the occasion when and for the service in which they were so employed.

"Sixth. If it be not in fact true, as stated by you to be true, that you have fully and duly performed all of the conditions of said trust agreement on your part to be performed, then state the facts, if any, in the conduct, action, or behavior of these plaintiffs or either of them, which constitute the cause, or excuse, as the case may be, the failure on your part to carry out and perform the conditions of said trust agreement on your part to be performed.

"Seventh. If it be not in fact true, as stated by you to be true, that you have fully and duly performed all the conditions of said trust agreement on your part to be performed, and if such failure on your part be not due to the conduct, action, or behavior of these plaintiffs or either of them, then state the facts which constitute your failure to carry out and perform the conditions of said trust agreement on your part to be performed.

[fol. 72] "Eighth. As to the alleged interest designated in said counter claim as the American Central Life Insurance Company mortgage, state the fact or facts which constitute your rights to have acquired said mortgage by purchase and assignment and your right now to assert said mortgage interest as one hostile and adverse to your said interests and duty as trustee under and by virtue of said trust agreement, or, in the alternative, if said mortgage was by you acquired as an act of repudiation or in furtherance of an act of repudiation on your part of said trust agreement, then state such, all such facts as an alternative showing, all to the end that these plaintiffs may be advised whether said mortgage is pleaded as a fact within the terms of said trust or as a fact hostile and adverse to said trust."

On October 23, 1917, the plaintiffs severally moved the court for an order to strike from the files the joint second amended counter claim of the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as trustee of the estate of Dora E. Rooker. The substance of this motion was to the effect following:

"That said joint second amended counter claim is vague, indefinite and uncertain and tenders no issue; that in the nature of the action said counter claim should proceed upon either (1) the single and definite theory of an accounting founded upon the full and complete performance by said defendants jointly of the contract evidenced by the written instruments bearing date October 11, 1909, constituting [fol. 73] the so-called trust agreement, purporting to have been executed by certain of the parties hereto, viz.: these plaintiffs and

said trustee, or (2) upon the single and definite theory of a quantum meruit with valuation as fixed by the said trust agreement and founded upon the partial and incomplete performance by said defendants jointly of the so-called trust agreement with such statement of facts as should excuse complete performance of said so-called trust agreement, or (3) upon the single and definite theory of a quantum valebat founded upon acts done by the said defendants jointly to the credit, use, benefit and advantage of the said trust estate in the aggregate exceeding in value the damages suffered and sustained by the said trust estate because of any failure, omission, or wrong done by the said defendants to the damage of said trust estate, and which said excess in value of benefits over damages the said trust estate has accepted, retained and appropriated to its own use, benefit and advantage; that said joint second amended counter claim avers facts inconsistent with and contradictory of the statement therein, 'that said cross-complainant has fully and duly performed all of the conditions on its part to be by it performed,' and that because of such inconsistencies and contradictions, the said averment is nullified and destroyed, to wit, the averment, 'that said cross-complainant has fully and duly performed all of the conditions on its part to be by it performed,' and that in the premises there is no issue tendered by the said second amended counter claim that the said defendants are entitled to any recovery whatever upon and by virtue of said pleading as upon an issue tendering the performance by said defendants of any contract fixing any liability whatsoever against these plaintiffs in favor of said defendants upon said counter claim; that said joint second counter claims avers no fact in excuse of the failure on defendants' part to make full and complete performance of said so-called trust agreement and by reason of which excuse for the full and complete performance of said so-called trust agreement said defendants are entitled herein to employ said trust agreement to fix the value, as upon a quantum meruit, of any act or acts done or claimed to have been done by said defendant under and by virtue of said trust agreement, and these plaintiffs say that in the premises there is no issue tendered by said joint second amended counter claim that the said defendants are entitled to any recovery whatsoever, as upon an issue the quantum meruit, against these plaintiffs in favor of said defendants upon said counter claim; that said joint second amended counter claim avers no fact founded upon acts done by said defendants jointly to the credit, use, benefit and advantage of the said trust estate in the aggregate exceeding in value the damages suffered and sustained by the said trust estate because of any failure, omission, or wrong done by the said defendants to the damage of said trust estate and which said excess in value of benefits over damages the said estate has accepted, retained and appropriated to its own use, benefit and advantage; that upon the facts in the premises the said joint second amended counter claim tenders no issue whatsoever in favor of said defendants and is useless and can accomplish no proper and lawful purpose in this cause, [fol. 75] and is needless encumbrance of the record and should be stricken from the files herein."

Demurrers were filed by plaintiffs to each paragraph of the second amended counter claim as supplemented, for want of facts sufficient to constitute a cause of action in favor of the defendants and connected with the cause of action in suit herein and with their demurrer plaintiffs filed a memorandum of points as required by the Indiana practice act. The substance of the demurrer and points was as follows:

"Plaintiffs demur to each paragraph of second amended counter claim as supplemented for the reason the same does not state facts sufficient to constitute a cause of action connected with the cause of action in suit herein. For their memorandum plaintiffs state these points, viz:

"1. The second amended counter claim as supplemented is joint to the plaintiffs (defendants) and must be good as to both or bad as to both.

"There is no privity of contract as between the plaintiffs and either of the defendants except the defendant as trustee.

"It contravenes the mandate of the Supreme Court in this cause to admit issues in this cause which are outside of those within the terms and effect of the trust agreement and the notice of repudiation hereof and the suit for an accounting as between the plaintiffs and the trustee. If the trustee borrowed money from Fidelity Trust Company, or any other bank or banker whomsoever such transaction would not under the trust agreement, constitute or create a privity between such bank or banker and these plaintiffs.

"2. Steps taken by the Fidelity Trust Company in its corporate capacity proper to fortify the title it sought to acquire and did acquire unlawfully were acts done in aid of its own wrong and have no place in an accounting between the cestuis que trustents and the trustee.

"3. The trustee and its co-plaintiff having elected to repudiate the trust agreement and having thereby caused the cestuis que trustents to change their situation greatly to their loss and damage will not be heard to declare that such act of repudiation was void and that such election to repudiate is to be disregarded.

"The trustee having elected, with the aid and participation of its co-plaintiff to repudiate the trust and having thereafter caused the plaintiffs to suffer loss and damage and to change their situation could not in any court ask that said trust agreement be reinstated except upon a tender that equity be done these plaintiffs. There is no tender of equity."

On October 23, 1917, your petitioners filed their answer in several paragraphs to said counter claim in said Hamilton Circuit Court.

In the first of these answers these petitioners admitted the execution of said trust agreement and the two concurrent deeds and joined issue with a general denial as to all other averments of the counter claim.

[fol. 77] The second answer was a plea of non est factum to meet a variance between certain orders as pleaded. At the trial this pleading was corrected.

The third paragraph was omitted.

The fourth paragraph was payment.

The fifth paragraph was partial and was directed to the items of fees, commissions and interest and as to these items the answer tendered the issue of failure of consideration upon these specifications, to wit:

"A. Said defendant as trustee promised and agreed in consideration of said compensation to furnish the moneys and means with which to complete said dwelling house and outbuildings appurtenant thereto, and other necessary and proper structures, and to equip the same with modern utilities and conveniences, all to be duly completed and installed, and to furnish the moneys and means necessary to the true and better and complete performance of said contracts of trust and to the successful maintenance of and care for said real estate and the business thereon conducted.

"B. Said defendant as trustee promised and agreed to obtain from other banks and bankers upon the promissory notes of said Dora E. Rooker such sum or sums of money over and above the sum said defendant trustee was to furnish out of its moneys and means, as should be necessary to complete said dwelling house and outbuildings appurtenant thereto and other necessary and proper structures, and to equip the same with modern utilities and conveniences, all to be duly completed and installed; and to that end said defendant trustee obligated itself and it became and was its duty to protect the [fol. 78] credit of said Dora E. Rooker generally and particularly at banks.

"C. Said defendant as trustee obligated itself and it became and was its duty to protect said real estate and said trust estate against waste and to pay promptly upon the written order and direction of said Dora E. Rooker all indebtedness within the terms of said contract and against said property.

"D. That said defendant as trustee obligated itself to begin within the period of one year after the execution of said trust agreement to reduce said trust estate to cash and to administer said trust and liquidate its credits and debits in the form and manner prescribed in said contract.

"E. That said defendant as trustee obligated itself to strict fidelity to said trust estate and to the said Dora E. Rooker and William V. Rooker, all to the end that the interests of said estate would thereby be the better conserved and said trust the more prudently and advantageously administered.

"Yet notwithstanding the said duties and obligation of said defendant trustee, which it was to do and perform in consideration of and as its compensation to said Dora E. and William V. Rooker for said rates, fees, commission and charges, said defendant trustee failed, neglected and refused to furnish the moneys and means with

which to complete said dwelling house and outbuildings appurtenant thereto, and other necessary and proper structures and to equip the same with modern utilities and conveniences, the same to be [fol. 79] duly completed and installed, and said defendant trustee failed, neglected and refused to furnish the moneys and means necessary to the true and better and complete performance of said contract of trust and to the successful maintenance of and care for said real estate and the business thereon conducted.

"That said defendant trustee failed, neglected and refused to obtain money from other banks and bankers upon the promissory notes of said Dora E. Rooker and failed, neglected and refused to protect and preserve the credit at bank of said Dora E. Rooker, to the end that she might obtain such sum or sums of money over and above the sum said defendant trustee was to furnish out of its moneys and means as should be necessary to complete said dwelling house and outbuildings appurtenant thereto and other necessary and proper structures and to equip the same with modern utilities and conveniences, so that the same should be duly completed and installed; but, on the contrary, said Fidelity Trust Company in its corporate capacity proper and with the knowledge and consent of said trustee unlawfully and without right set about to appropriate and convert to itself said trust estate and the better to accomplish such unlawful purpose, it set about to injure and destroy the credit at banks of said Dora E. Rooker and William V. Rooker, and to the end it persistently baffled and annoyed such banks, as the said Dora E. Rooker and William V. Rooker had theretofore satisfactorily done business with and thereby said Trust Company, with the [fol. 80] knowledge, consent and participation of said trustee, greatly impaired and wholly destroyed the credit of said Dora E. Rooker and William V. Rooker at said banks.

"That said defendant trustee wholly failed, neglected and refused to protect said real estate and said trust estate against waste, and to pay promptly upon the written order and direction of said Dora E. Rooker all indebtedness within the terms of said contract and against said property; but, on the contrary, said defendant trustee allowed taxes on said real estate to become delinquent, and allowed said property to go without insurance, and refused to pay the written orders of said Dora E. Rooker for sums justly due to claimants against said trust estate, and caused and procured said claimants to file notices of mechanic liens against said trust estate, and to sue thereon and reduce the same to judgment with attorney's fees and costs, and to assign such judgment to said Trust Company, in its corporate capacity proper.

"That said defendant trustee wholly neglected, failed and refused to begin, within the term of one (1) year, to reduce said trust estate to cash and to liquidate said trust in the form and manner prescribed in said contract; but, on the contrary, said defendant Trust Company, trustee under the domination and control of such Trust Company in its corporate capacity proper, for the unlawful uses and purposes of said Trust Company as aforesaid, repudiated its said duties of

fidelity and trust, and gave to these plaintiffs notice in writing of [fol. 81] such repudiation, a copy of which marked 'Exhibit No. 1,' is filed with the complaint herein; that said Trust Company and said trustee tendered back said estate grossly wasted and heavily encumbered, and thereupon demanded that these plaintiffs pay forthwith in money the demands of said Trust Company as a mortgagee; that said notice of repudiation of said trust was served on these plaintiffs before the bringing of this suit.

"That by reason of the premises said defendant trustee has forfeited and waived the consideration upon which it might lawfully demand the collection of the interest rates, commission, fees and charges mentioned in said trust agreement, and by reason thereof said compensation which it now demands is unjust, usurious and unlawful.

The sixth paragraph was partial and set forth that the counterclaim sought to recover penalties imposed by law for delinquent taxes while the title to the affected real estate was in the name of the Fidelity Trust Company; that penalties arose out of negligence that the trustee was at fault and the trust estate not liable.

The seventh paragraph was partial and pertained to penalties imposed for delinquency in the payment of interest; that the trustee was at fault and the trust estate not liable.

The eighth paragraph was partial and pertained to the contract for plumbing. It charged that the trustee had abrogated the contract for this work, to the injury of the trust estate and asked for an accounting.

[fol. 82] The ninth paragraph was partial and pertained to seed which was sown but the crop not harvested because of the wrongful act of the trustee.

The tenth paragraph was partial and pertained to the duplication of an item of five hundred and five dollars (\$505.00) indemnity furnished to a surety company on an appeal bond. The fund was applied to payment of the judgment appealed from and was thereupon charged twice—once when advanced to the surety company and again when applied on the judgment.

The eleventh paragraph was partial and applied to an item of Five Hundred Seventy-one and 21/100 Dollars (\$571.21) in the face of a judgment on a mechanics' lien. The case should not have been litigated; there was no defense; the claim was honest and due; the trustee refused to pay the claim but required that the suit be brought which added two attorneys' fees to the demand; thereupon the trustee acquired the judgment by assignment, as a speculation against the trust estate.

The twelfth paragraph was partial and pertained to office expenses and administrative items of the Trust Company which never were within the terms of the trust agreement.

The thirteenth paragraph was partial and pertained to insurance premiums paid by the Trust Company while it held the title to property of the trust estate pursuant of sheriff's sales adversely to the trust.

The fourteenth paragraph was partial and pertained to an item [fol. 83] of Fourteen Thousand Four Hundred Twenty-four and 50/100 Dollars (\$14,424.50) representing the value of a mortgage purchased by the Trust Company and reduced to action against Dora E. Rooker after the Trust Company had repudiated the trust and renounced the office of trustee.

The fifteenth paragraph was partial and pertained to items aggregating Eighteen Thousand Four Hundred Eighty-nine and 31/100 Dollars (\$18,489.31) which were not incurred in the administration of the trust.

On October 23, 1917, plaintiffs filed their supplemental complaint in three paragraphs further complaining in the first paragraph of said supplemental complaint of grievances which have occurred to them since the filing of their original complaint herein; that since the bringing of this action and since the filing of the amended complaint herein, the Fidelity Trust Company in its corporate capacity proper, and the Fidelity Trust Company as trustee, wrongfully and unlawfully pursued each of the purposes and acts hereinafter more particularly set forth, and by such pursuit and acts have sought to consummate and make effective the wrongful and unlawful scheme and collusion heretofore made and entered into by and between them, whereby said Trust Company in its corporate capacity proper was designing and intending to sequester, take over, appropriate and convert as its own gain, advantage and profit the entire property and value of said trust estate of the value, to wit, Eighty-five Thousand Dollars (\$85,000.00) to the wrongful and unlawful exclusion of these plaintiffs and all other just, lawful and proper beneficiaries of [fol. 84] said trust estate; that in aid and advancement of said scheme and collusion, said Fidelity Trust Company in its corporate capacity proper, and with the knowledge, connivance and consent of said trustee, and with the unlawful and wrongful acquiescence, aid and assistance of said trustee, declared said trust agreement of date October 11, 1909, and the said several deeds executed concurrently therewith to be a mortgage, and to that effect and in furtherance of said scheme and collusion said Fidelity Trust Company in its corporate capacity proper did on, to wit, the 24th day of March, 1913, wrongfully and unlawfully and maliciously and without probable cause therefor declare upon said trust agreement and said several deeds executed concurrently therewith as a mortgage executed by these plaintiffs to said Fidelity Trust Company in its corporate capacity proper, and in denial of said instruments as a deed of trust executed by these plaintiffs to said Trust Company as trustee; and so declaring said Trust Company in its corporate capacity proper, did on said date file in this cause the so-called cross complaint of said Fidelity Trust Company in its corporate capacity proper, whereby and wherein said cross-complainant asked that said trust agreement and said deeds be adjudged to be a mortgage executed by these plaintiffs to said Fidelity Trust Company in its corporate capacity proper, and in denial of said instruments as a trust deed executed by these plaintiffs to said Trust Company as trustee, and further asking that

upon such adjudication of said instruments to be a mortgage that said mortgage be adjudged to have been defaulted by these plaintiffs [fol. 85] and then and there subject to foreclosure as a mortgage, and that the same be foreclosed as mortgages are foreclosed, and that said premises therein described, the same being the said trust estate, be sold upon a certified copy of such decree as other lands are sold on execution, and cross complainants further prayed judgment for its costs and for all other proper relief in the premises.

"That thereafter such proceedings were had in said cause as that on, to wit, the 5th day of November, 1913, said Fidelity Trust Company filed its amended cross complaint in this cause; that said amended cross complaint was both an amended and a supplemental cross complaint, and as a supplemental pleading it brought new matter into issue in this cause. That in said supplemental and amended cross complaint, said Trust Company in its corporate capacity proper declared upon each of the following several items of payment, each as being outside of and beyond the terms of any trust agreement and particularly of the said trust agreement executed by and between these plaintiffs, and said Fidelity Trust Company as trustee, to wit: (Here follows specification of items.)

"That a bill of particulars was attached to and filed with said amended cross complaint purporting to show specifically each and every of the said items declared upon in said cross complaint as having been paid out by the said Fidelity Trust Company in its corporate capacity proper, and as constituting and comprising the consideration of the said mortgage to secure the said mortgage loan purporting to have been made by the said Fidelity Trust Company in [fol. 86] its corporate capacity proper to said Dora E. Rooker and to said Dora E. Rooker and William V. Rooker on their respective lands in Hamilton County and in Marion County, all in the State of Indiana. That said bill of particulars included each of the items specified in the exhibits following, to wit: (Here follows specifications of items.)

"That upon said amended cross complaint said Fidelity Trust Company in its corporate capacity caused and required issue to be joined in this cause, and such proceedings thereafter to be had as resulted in judgment and decree of this court adjudging said trust agreement and said deed executed concurrently therewith to be a mortgage, and adjudging said mortgage to be in default and adjudging that said mortgage be foreclosed, and in decreeing the foreclosure of said mortgage and in ordering and directing that said real estate described in said trust agreement and in the deeds executed concurrently therewith be sold upon certified copy of such decree as other lands are sold on execution; that thereafter said Fidelity Trust Company in its corporate capacity proper, caused and procured certified copies of said decree to be issued respectively to the Sheriff of Marion County and to the Sheriff of Hamilton County, and caused and procured said Sheriffs respectively before advertising and selling said affected real estate in each of said Counties to cause the same to be appraised; that said Fidelity Trust Company in its corporate ca-

capacity proper bid in said real estate at said respective sales and thereupon caused and procured said respective Sheriffs to issue to said [fol. 87] Fidelity Trust Company in its corporate capacity proper the Sheriff's certificate of purchase of said respective tracts of land in said respective Counties; that upon the expiration of the year for redemption of said sales said Fidelity Trust Company in its corporate capacity proper caused and procured said respective Sheriffs to issue their several Sheriff's deeds conveying said land so sold as aforesaid to said Fidelity Trust Company in its corporate capacity proper; that said proceedings throughout were prosecuted maliciously and without probable cause by said Fidelity Trust Company in its corporate capacity proper. That such prosecution of said action caused and required the said Dora E. Rooker and William V. Rooker to lay out and expend a large sum of money, to wit, Fifteen Thousand Dollars (\$15,000.00) in and about the defense of said action on said cross complaint; that said certificates of said Sheriffs included the prosecution of and appeal to the Supreme Court of Indiana from said judgment of said Hamilton Circuit Court; that in and by the opinion and judgment of said Supreme Court the judgment of the Hamilton Circuit Court in the affected premises was wholly reversed and set aside and held for naught, and said trust agreement was adjudged to be as it purports to be, a trust agreement and not a mortgage; that by reason of the said malicious prosecution of said action and without probable cause therefor the said Dora E. Rooker and William V. Rooker have been damaged as upon the facts stated in this paragraph of supplemental complaint, in the sum of Fifteen Thousand Dollars (\$15,000.00), for which sum they demanded judgment upon this paragraph of supplemental complaint.

[fol. 88] Dora E. Rooker and William V. Rooker, further complaining of grievances which had occurred to them since the filing of their original complaint herein, and for second paragraph of supplemental complaint said, that plaintiffs now here reaffirmed each and every allegation in their original complaint and in their amended complaint herein as of the several respective dates of said several respective pleadings; that since the bringing of this action the Fidelity Trust Company in its corporate capacity proper, and the Fidelity Trust Company as trustee, had wrongfully and unlawfully pursued, and by such pursuit have sought to consummate and make effective, a wrongful and unlawful scheme and collusion heretofore made and entered into by and between them, but at a particular time at which these plaintiffs being without information were unable to state, whereby said Trust Company in its corporate capacity proper and for itself sequestered, took over, appropriated and converted as its own gain, advantage and profit the entire property and value of said trust estate to the wrongful and unlawful exclusion of these plaintiffs and of all other just, lawful and proper beneficiaries of said trust estate; that in aid and advancement of said scheme and collusion said Fidelity Trust Company in its corporate capacity proper, and with the knowledge and consent of said trustee and with the wrongful and unlawful acquiescence, aid and assistance of said

trustee did declare said trust agreement of date October 11, 1909, and the said several deeds executed concurrently therewith to be a mortgage [fol. 89] gage, and to that effect and in furtherance of said scheme and collusion they did confederate and conspire together to cause and procure said trust agreement to be adjudged in this action to be a mortgage, and as such mortgage to be foreclosed, and upon such foreclosure to order that said real estate described in said deeds of trust be sold as other lands are sold on execution; that in and by said proceedings said Fidelity Trust Company in its corporate capacity wrongfully and unlawfully obtained to itself the legal title in fee simple to said real estate; that while the said title to said real estate was in the said Fidelity Trust Company in its corporate capacity proper, said Fidelity Trust Company caused and committed waste to said real estate and wrongfully and unlawfully permitted waste to be committed on said real estate to such extent and manner as that a scale house, granary and crib building on said Marion County lands was wholly destroyed to the damage of said lands, Four Thousand Dollars (\$4,000.00); that the roof on the horse barn on said Marion County real estate was injured and impaired to such extent as to require a new roof to be placed thereon at a cost and expense of Five Hundred Dollars (\$500.00); that the buildings on said Marion County land were permitted to go without painting or other protection against the elements, to the injury of said buildings and said trust estate in the sum of Five Hundred Dollars (\$500.00); that fifteen hundred (1,500) rods of fencing on said Marion County lands were permitted to waste and be destroyed to the damage of said real estate, Three Thousand Dollars (\$3,000.00); that on said Hamilton [fol. 90] County lands three thousand (3,000) rods of fencing were permitted to waste and become destroyed to the damage of these plaintiffs and said trust estate in the sum of Six Thousand Dollars (\$6,000.00); that the barns and other buildings on said Hamilton County lands were permitted to waste and be injured by the elements to the damage of Three Thousand Dollars (\$3,000.00). That in all said trust estate was by reason of the said unlawful and wrongful conduct of the Fidelity Trust Company in its corporate capacity proper and of said Fidelity Trust Company as trustee conniving with and aiding and abetting its said co-defendant, wasted and damaged in the sum of Seventeen Thousand Dollars (\$17,000.00).

"Wherefore, on this paragraph of complaint plaintiffs demand judgment in the further sum of Seventeen Thousand Dollars (\$17,000.00).

Dora E. Rooker and William V. Rooker, plaintiffs, further complaining of grievances which had occurred to them since the filing of their original complaint herein, and for their third paragraph supplemental complaint said, that plaintiffs now here reaffirmed each and every allegation contained in their original complaint and in the amended complaint in this cause as of the several respective dates of said several respective pleadings. That after the execution of said trust agreement and said deeds which were executed concurrent therewith by and between these plaintiffs and said Fidelity Trust Company as trustee but at a particular time to these plaintiffs

known, and for that reason they are here unable to give the date thereof, said Fidelity Trust Company in its corporate capacity proper [fol. 91] and said Fidelity Trust Company as trustee, wrongfully and unlawfully and with the purpose and intent that said Fidelity Trust Company in its corporate capacity proper might and should take over to itself as its own, made and entered into as between themselves a scheme and collusion to destroy the credit and capacity of these plaintiffs to protect themselves in said trust estate against any unlawful act and purpose on the part of said defendants and to that purpose and effect and in carrying out said confederacy and conspiracy between them, said defendants agreed that said Fidelity Trust Company should not furnish the money with which to maintain said property and to carry on the business conducted thereon. That in furtherance of said conspiracy and confederacy said defendants did not nor did either of them furnish the necessary capital with which to maintain said farms and to operate them and to carry on the business conducted thereon; that said trust estate then and there consisted of a large acreage of agriculture lands, towit, three hundred fifty (350) acres. That by reason of the said wrongful and unlawful acts of the defendants in withholding the capital necessary to operate said lands and in declining and refusing to carry out said trust agreement, said lands were permitted to go uncultivated and to be and remain idle to such extent as the earning value thereof was impaired and destroyed to the extent of an average of Ten Dollars (\$10.00) per acre on each acre of said land, and for a period, towit, of seven (7) years, and in the aggregate, towit, Twenty-Four Thousand Five Hundred Dollars (\$24,500.00).

[fol. 92] Wherefore, plaintiffs on this paragraph of supplemental complaint demanded judgment in the sum of Twenty-four Thousand Five Hundred Dollars (\$24,500.00).

49. And plaintiffs say and would show unto the court that on the 29th day of May, 1918, the defendants filed their so-called joint supplemental second amended counter claim in two paragraphs. The first of these averred that since the filing of the second amended counter claim additional payments had been made, which were specified and for which judgment was asked. The second paragraph was an attempted retraction of the act of repudiation of the trust agreement and brought into the record in the case what may be called the Ewbank Judgment of the Marion Circuit Court. This paragraph was in substance to the effect following:

"For second and further paragraph by way of counter claim, defendant says that while the plaintiffs herein, since the commencement of their original action and since the filing of the last counter claim of this defendant herein have contended before this court, that the deeds of conveyance and the memorandum of trust executed contemporaneously therewith constitute a trust estate and vest the title to the lands in the defendant Fidelity Trust Company as trustee, with the power vested in this defendant as trustee, to sell the same according to the provisions of the trust, and have complained because the lands were not sold, yet notwithstanding that fact they

have ever since the filing of the defendant's second amended counterclaim outside of the court, openly claimed and asserted a proprietary [fol. 93] interest in said lands and asserted title thereto and denied this defendant's right, as trustee, to sell and convey the same pursuant to and for the purposes enumerated in said memorandum of trust; * * * that said plaintiffs after the rendition of judgment in this court on the original complaint and cross-complaint of the parties, namely, on May 26, 1916, filed against this defendant in the Marion County Circuit Court their complaint in statutory form to quiet the title in them to said Marion County lands; that on June 4, 1916, they filed a second paragraph of complaint in said cause, followed by other pleadings on the part of both parties; that after said original cause referred to was reversed in the Supreme Court, said plaintiffs still pursued and pressed said action in the Marion County Circuit Court to quiet their title, whereupon this defendant on June 23, 1917, filed its cross complaint, setting up the title, as trustee, to said Marion County lands under the deed of trust and memorandum of trust set forth in the pleadings in this cause, and praying for an injunction enjoining the plaintiffs in said action, Dora E. Rooker and William V. Rooker, from denying or disputing this defendant's title, as trustee, to said lands, and from denying, disputing, obstructing or interfering with the sale of said lands by said trustee under and pursuant to its power of sale; that afterward, on October 4, 1917, said cause was submitted to the Marion County Circuit Court for trial finding and judgment, and a special finding of facts and conclusions of law having been requested by the plaintiffs in this action, the court, on December 4, 1917, filed its special findings and conclusions of law, and thereafter on February 5, 1918, entered judgment upon the special findings and conclusions of law, by which judgment said court adjudged the sheriff's sale of said Marion County real estate made under the decree of foreclosure rendered on the original judgment in this cause null and void and of no effect, and further adjudged that this defendant, Fidelity Trust Company, as trustee, under and pursuant to the deed of trust referred to, as such trustee, is the owner in fee simple, as trustee, of said Marion County lands, with full power to sell and convey the same in accordance with the provisions of said deed of trust by which it was conveyed to this defendant, as trustee, by the plaintiffs herein, and that all claims of the plaintiffs in said action were unfounded, and that the title thereto of this defendant, Fidelity Trust Company, as trustee, under said deed of trust be quieted and forever set at rest, and that the plaintiffs, Dora E. Rooker and William V. Rooker, be perpetually enjoined from denying or disputing the title of said Fidelity Trust Company, as trustee, to said lands, and from denying, disputing, obstructing or interfering with the sale of said lands by said trustee, under and pursuant to its power of sale; that after the rendition of said judgment and the granting of said injunction, the plaintiffs prayed an appeal to the Supreme Court, and sixty (60) days' time was given to file bills of exceptions, and the appeal prayed for granted upon filing bond in the sum of Five Thousand Dollars (\$5,000.00); that no bill of exceptions or bond was filed in said

cause, but on May 15, 1918, the plaintiffs, Dora E. Rooker and William V. Rooker, ordered a transcript for appeal to the Supreme Court, all for the purpose of hindering and obstructing the sale of said Marion County lands by this defendant pursuant to and under the provisions of the trust created by the plaintiffs.

"And this defendant now further shows to the court that it has given notices of the sale of said Marion County lands pursuant to the provisions of and in accordance with the terms of said agreement of trust referred to, by serving a ninety-day notice in writing upon the plaintiffs, Dora E. Rooker and William V. Rooker, and then publicly advertising said Marion County lands for sale in the Indianapolis News and Indianapolis Star, four (4) weeks successively, once a week; that while several inquiries were made by prospective purchasers, this defendant was unable to secure the purchaser on account of widespread rumors afloat in the community that this defendant, as trustee, would be unable to give peaceful possession to a purchaser of said lands, which rumors to that effect are the result of the conduct of the plaintiffs herein; that the plaintiffs still retain possession of all said lands and enjoy the profits thereof, without paying any obligations, charges or even taxes, and that said Marion County lands are incumbered with a mortgage given to secure a loan of Six Thousand Dollars (\$6,000.00) made by the plaintiffs herein prior to the conveyance of said lands to this defendant, as trustee, and that said mortgage, with several years' interest thereon, remains unpaid, and that said Marion County lands will not sell by far for enough to pay off said mortgage and the moneys advanced by this defendant, and [fol. 96] that it will be necessary to sell both the Marion County and the Hamilton County lands in order to pay and discharge the amounts advanced as hereinbefore shown; that the plaintiffs herein are in like manner also claiming an interest in said Hamilton County lands and are asserting and attempting to assert and claim title to the same, which said interest so claimed by plaintiffs herein is adverse to this defendant's claim and title to said real estate as trustee, under and pursuant to the deed of trust and memorandum of trust executed by the plaintiffs, and that the claim of said plaintiffs is unfounded and without right, and is a cloud upon this defendant's title, as trustee, to said real estate, and that this defendant, as trustee, is the owner of and entitled to have its title as trustee quieted and forever set at rest in and to said lands situate in Hamilton County, Indiana, and described as follows: (Here follows description by metes and bounds of two hundred seventy-five (275) acres of land, being the Hamilton County real estate described in the trust deed of October 11, 1909.)

"And this defendant further shows the court that the plaintiffs herein will interfere with, hinder and obstruct any attempted sale of said Hamilton County lands by this defendant, as trustee, although such sale be attempted to be made under and pursuant to the powers and in strict compliance with the provisions contained in said deed of trust and memorandum of trust, and that unless they be enjoined from interfering with, hindering and obstructing such sale, this defendant, as trustee, will be powerless to exercise and discharge the power of sale conferred upon it as such trustee. In consideration

[fol. 97] thereof, this defendant says that the sales of the lands under and in pursuance of the powers and in compliance with the provisions of said trust, should be made by this defendant, as trustee, under the order and guidance of this court, and that without said aid and assistance of the court by reason of the plaintiffs' action as aforesaid, no advantageous sales can be made, and further that if a sale is made the plaintiffs will refuse to give possession of the lands unless this court by its order grants its assistance.

"Wherefore, this defendant prays the court that its title in and to said Hamilton County lands may be forever quieted and that upon judgment being rendered herein the court also enjoin the plaintiffs from denying or disputing the title of this defendant, as trustee, to said Hamilton County lands, and from denying, disputing, obstructing or interfering with the sale of said lands by said trustee under and pursuant to its power of sale contained in the deed and memorandum of trust executed by the plaintiffs herein to this defendant as such trustee, and that the court enter its order and decree directing the sale of said Marion County and Hamilton County lands, and for all other appropriate equitable relief as to the court may seem just and necessary." (Here followed specifications of vouchers alleged to have been paid.)

50. And plaintiffs say and would show unto the court that at the trial of said cause these plaintiffs offered and read in evidence, along with other evidence produced by them, each of the following record papers and documents, to wit:

[fol. 98] (1) The trust agreement hereinbefore recited as having been executed on October 11, 1909 by and between these plaintiffs and said Fidelity Trust Company; (2) the trust deed hereinbefore recited as having been executed on October 11, 1909 by these plaintiffs conveying upon trust said Marion County real estate to the Fidelity Trust Company as trustee; (3) the trust deed hereinbefore recited as having been executed on October 11, 1909 by these plaintiffs conveying upon trust said Hamilton County real estate to the Fidelity Trust Company as trustee; (4) the written notice of repudiation of the trust and renunciation of the office of trustee, hereinbefore recited, served on these plaintiffs by the Fidelity Trust Company and the Fidelity Trust Company as trustee on October 28, 1912; (5) the complaint to foreclose said American Central Life Insurance Company Mortgage on the Hamilton County real estate which complaint was filed on May 26, 1914, in the Hamilton Circuit Court of Indiana as Cause Number 16,755 wherein the Fidelity Trust Company was plaintiff and Dora E. Rooker and William V. Rooker were defendants; (6) the Sheriff's deed on decretal sale conveying to the Fidelity Trust Company as purchaser the Marion County land of the trust estate for the sum of Four Thousand Dollars (\$4,000.00), said deed bearing date June 8, 1915; (7) the Sheriff's deed on decretal sale conveying to the Fidelity Trust Company as purchaser the Hamilton County lands of the trust estate for the sum of Twenty Thousand Eight Hundred and Sixty-four Dollars and Fourteen Cents (\$20,864.14), said deed bearing date September 28, 1915; that each [fol. 99] of said Sheriff's deeds was in the statutory form and was

admitted in evidence without objection; that in said trial these plaintiffs made objections to the admission of items in evidence which were not in accord with the complaint and the supplemental complaint of these plaintiffs and their answers to the defendants' counter claim, and to each adverse ruling these plaintiffs excepted in the time, form and manner provided by law; that upon the trial of said cause the court made a special finding of the facts; that upon said special finding of facts these plaintiffs presented to the court their motion for judgment in favor of plaintiffs, which motion was overruled by the court and exception to the ruling reserved by plaintiffs; that upon said special finding of facts the court stated its conclusions of law to which plaintiffs excepted.

51. And plaintiffs say and would show unto the court that thereafter on December 21, 1918, the Circuit Court rendered its second judgment herein, which in substance was as follows, to wit:

"Come now the parties and the court having found the facts specially and stated its conclusions of law thereon, now renders judgment accordingly.

"It is therefore considered, ordered, adjudged and decreed by the court that the plaintiffs take nothing in this action except as hereinafter provided in the disposition of the proceeds of the sale of the lands comprising the trust estate hereinafter described.

"It is further considered, ordered, adjudged and decreed that the defendant and cross-complainant Fidelity Trust Company has not mismanaged, repudiated or abandoned its trust, but has faithfully [fol. 100] performed its duties as trustee under the deeds and trust agreement set out in the pleadings and special findings, by advancing large sums of money for improvements on the lands of said trust estate and to free and preserve said estate from dissipation through liens and incumbrances, by taking proper steps under said instruments to sell the same and otherwise and now holds the legal title to said lands as trustee for the sole purpose of completing its duties and obligations, as such trustee, by making sale of the same and by making distribution of the proceeds according to the terms of said deeds and trust agreement and not otherwise, and in no other capacity. That said defendant and cross-complainant Fidelity Trust Company, as such trustee, holds the legal title to said lands and the appurtenances thereunto belonging, and is fully and lawfully empowered and under the duty to sell and convey said lands, by deeds of warranty of the fee simple title, and give full possession of the same which lands are described as follows: (Here followed a description of the three hundred fifty-five (355) acres of land comprising the trust estate, there being two hundred seventy-five (275) acres in Hamilton County and eighty (80) acres in Marion County.)

"It is further considered, ordered, adjudged and decreed that said Fidelity Trust Company, trustee, is entitled to judgment on its account against said trust estate to be paid out of the proceeds of the sale of the lands so held in trust by it, as hereinbefore provided, in the sum of Fifty Thousand Six Hundred Ninety-seven Dollars (\$50,697.00).

[fol. 101] "It is further considered, ordered, adjudged and decreed that said plaintiffs, Dora E. Rooker and William V. Rooker, by said deed of conveyance and trust agreement have parted with all their title to said real estate and appurtenances thereunto belonging, and the right to the possession thereof and the use, rents and profits thereof, and have no interest therein other than in such proceeds of the sale thereof as may remain to be distributed to the said Dora E. Rooker under this judgment and said trust agreement. That any other interest in or control over said lands than said interest in the proceeds, aforesaid, heretofore and now being asserted by said plaintiffs, adverse to the title of said trustee, is wrongful, without right and unfounded and obstructive of the completion of the execution of said trust by said trustee, and said Dora E. Rooker and William V. Rooker be and they are, each and both, hereby perpetually enjoined from denying or disputing the said title of the said Fidelity Trust Company, as trustee, to said lands above described and its right to the possession, use and rents and profits thereof, and from denying, disputing, obstructing or in any manner interfering with the sale of said lands by said trustee under and pursuant to its power of sale, conferred by said deeds and trust agreement, and from refusing to give possession and from in any manner interfering with, disputing or obstructing said trustee, or any purchaser or purchasers in giving possession or in taking possession when sale shall have been made of said lands, as aforesaid.

[fol. 102] "It is further considered, ordered, adjudged and decreed that said Fidelity Trust Company as such trustee proceed under the power and according to the terms of said deeds and trust agreement and make and complete sale of said above described lands, convey the same by warranty deeds in fee simple and put the purchaser or purchasers thereof in possession; that said Marion County lands having failed to sell for the sum of Eighteen Thousand Dollars (\$18,000.00) in the first year after the execution of said deeds and trust agreement or thereafter, said trustee having given the written notice to said plaintiffs and the notice by public advertisement provided for by said trust agreement and deeds, shall proceed to sell and convey said Marion County lands above described, forthwith for whatever sum they may bring, using diligence to procure the highest and best price obtainable therefor; that if said Marion County lands do not sell for lack of a bid, then said trustee shall, after giving said plaintiffs ninety (90) days' notice in writing of their intention to do so, sell and convey said Hamilton County lands for whatever sum they will bring over and above the upset price of Sixty-Five Thousand Dollars (\$65,000.00); that if said Hamilton County lands do not sell for said sum of Sixty-five Thousand Dollars (\$65,000.00), for lack of a bid for that sum, then said trustee, after ninety (90) days' notice in writing to the plaintiffs of their intention to do so, shall sell said Marion County lands at public auction for whatever sum and price they may bring, using diligence to procure the highest and best price obtainable therefor; that if upon any sale of the

[fol. 103] Marion County lands under this decree they do not fetch enough to pay the moneys and perform the obligations against said

trust estate, in this action found to exist and to be due, then said trustee shall, after giving thirty (30) days' notice to said plaintiffs of their intention so to do, proceed to sell, and sell and convey said Hamilton County lands for whatever sum and price they will bring, using diligence to procure the highest and best bid therefor. That any sale or sales made under this decree shall be forthwith submitted to this court for approval or disapproval.

"It is further considered, ordered, adjudged and decreed that when the sale or sales herein provided for have been made, said trustee shall apply the proceeds of said sales as follows:

"1. To the payment of the costs of this action.

"2. To the payment of any mortgage or other valid liens, charge, adverse interest or incumbrance upon and against said real estate or any part of any said real estate above described, which may be prior and superior and adverse to the interest of said Fidelity Trust Company, Trustee.

"3. To the payment of said Fidelity Trust Company of the judgment on account herein decreed in the sum of Fifty Thousand Six Hundred Ninety-Seven Dollars (\$50,697.00).

"4. To the reimbursement of said Fidelity Trust Company any sum or sums which may accrue to it in the execution of said trust, after the date of this judgment and decree.

"5. The rest and residue of any money derived from said sale or [fol. 104] sales shall be paid to the said Dora E. Rooker, her heirs, executors, administrators and assigns."

52. And plaintiffs say and would show unto the court that on January 2, 1919, the plaintiffs filed their respective motions to modify the judgment, said motions being in substance as follows, to wit:

"Particular No. 1. To strike out from the entry of said judgment the following words: 'It is, therefore, considered, adjudged and decreed by the court that the plaintiffs take nothing in this action except as hereinafter provided in the distribution of the proceeds of the sale of lands, comprising the trust estate hereinafter described,' and for cause plaintiffs say that so much of said ruling as above quoted contravenes the law of the case as decided by the Supreme Court on the former appeal.

"Particular No. 2. To strike out and suppress from said entry of judgment the following words, to wit: 'It is further considered, ordered, adjudged and decreed that the defendants and cross-complainant Fidelity Trust Company, has not mismanaged, repudiated, or abandoned its trust, but has faithfully performed its duties as trustee under the deeds and trust agreement set out in the pleadings and special findings,' and for cause plaintiffs say that so much of said entry of judgment as quoted above contravenes the law of the case as adjudged by the Supreme Court on the former appeal in this case.

"Particular No. 3. To strike out and suppress from said entry of judgment the following words, to wit: 'By taking proper steps under said instruments to sell the same and otherwise, and now holds the

[fol. 105] legal title to said lands as trustee for the sole purpose of completing its duties and obligations, as such trustee, by making sale of the same and by making distribution of the proceeds according to the terms of said deeds and trust agreement, and not otherwise, and in no other capacity,' and for cause plaintiffs says that so much of said entry of judgment as quoted above contravenes the law of the case as adjudged by the Supreme Court on the former appeal in this case.

"Particular No. 4. To strike out and suppress from entry of judgment the following words, towit: 'That said defendant and cross-complainant Fidelity Trust Company, as such trustee, holds the legal title to said lands and the appurtenances thereunto belonging, and is fully and lawfully empowered and under the duty to sell and convey said lands by warranty of the fee simple title, and give full possession of the same,' and for cause plaintiffs say that so much of said entry of judgment as quoted above contravenes the law of the case as adjudged by the Supreme Court on the former appeal in this case.

"Particular No. 5. To strike and suppress from entry of judgment the following words, towit: 'It is further considered, ordered, adjudged and decreed that said Fidelity Trust Company is entitled to judgment on its account against said trust estate to be paid out of the proceeds of the sale of the lands so held in trust by it, as hereinbefore provided, in the sum of Fifty Thousand, Six Hundred and Ninety-Seven Dollars (\$50,697.00),' and for cause plaintiffs say that so [fol. 106] much of said entry of judgment as quoted above contravenes the law of this case as adjudged by the Supreme Court on the former appeal in this case.

"Particular No. 6. To strike out and suppress from entry of judgment the following words, towit: 'It is further considered, ordered, adjudged and decreed that said plaintiffs, Dora E. Rooker and William V. Rooker, by their said deeds of conveyance and trust agreement have parted with all their title to said real estate and appurtenances thereunto belonging and the right to the possession thereof and the use and rents and profits thereof and have no interest other than in such proceeds of the sale thereof as may remain to be distributed to the said Dora E. Rooker under this judgment and said trust agreement. That any other interest in or control over said lands than said interest in the proceeds, aforesaid, heretofore and now being asserted by said plaintiffs, adverse to the title of said trustee is wrongful, without right and unfounded and obstructive of the completion of the execution of said trust by said trustee and said Dora E. Rooker and William V. Rooker, be and they are, each and both, hereby perpetually enjoined from denying or disputing the said title of the said Fidelity Trust Company, as trustee, to said lands above described and its right to the possession, use, rents and profits thereof, and from denying, disputing, obstructing or in any manner interfering with the sale of said lands by said trustee under and pursuant to its power of sale, conferred by said deeds and trust agreement, and from refusing to give possession and from in any

[fol. 107] manner interfering with, disputing or obstructing said trustee, or any purchaser or purchasers in giving possession or in taking possession when sale shall have been made of said lands as aforesaid,' and for cause plaintiffs say that so much of said entry of judgment as quoted above contravenes the law of the case as adjudged by the Supreme Court on the former appeal in this case, and the plaintiffs would further show unto the court that said trust was not at any time a trust of, or representing a trust of investment or of income, but said trust was solely a trust affecting the principal of said trust estate, and said trustee was to have been active only in making the trust sale in the matter of converting said trust estate into cash and in the maintenance of said trust pending the sale and the distribution of the proceeds of said trust estate and was not at any time a trust affecting the possession, rents and profits thereof prior to such sale.

"Particular No. 7. To strike out and suppress from the entry of judgment the following words, to wit: 'It is further considered, ordered, adjudged and decreed that said Fidelity Trust Company as trustee proceed under the power and according to the terms of said deeds and trust agreement and make and complete sale of said above described lands, convey the same by warranty deeds in fee simple and put purchaser or purchasers thereof in possession; that said Marion County lands having failed to sell for the sum of Eighteen Thousand Dollars (\$18,000.00) in the first year after the execution of said deeds and trust agreement or thereafter, said trustee having [fol. 108] given the written notice to said plaintiffs and the notice by public advertisement provided for by said trust agreement and deeds, shall proceed to sell and convey said Marion County lands above described forthwith for whatever sum they may bring, using diligence to procure the highest and best bid obtainable therefor; that if said Marion County lands do not sell for lack of a bid, then said trustee shall, after giving plaintiffs said ninety days' notice in writing of their intention so to do, sell and convey said Hamilton County lands for whatever sum they will bring over and above the upset price of Sixty-Five Thousand Dollars (\$65,000.00); that if said Hamilton County lands do not sell for said sum of Sixty-Five Thousand Dollars (\$65,000.00) for lack of a bid for that sum, then said trustee, after ninety days' notice in writing to plaintiffs of their intention so to do, shall sell said Marion County lands at public auction, for whatever sum and price they may bring, using diligence to procure the highest and best price obtainable therefor; that if upon any sale of the Marion County lands under this decree they do not fetch enough to pay the moneys and perform the obligations against said trust estate in this action found to exist and to be due, then said trustee shall, after giving thirty days' notice to said plaintiffs of their intention so to do, proceed to sell and sell and convey said Hamilton County lands for whatever sum and price they will bring, using diligence to procure the highest and best bid therefor; that any sale or sales made under this decree shall be forthwith submitted to this court for approval or disapproval,' that for cause plaintiffs say that so much of said entry of judgment

[fol. 109] as quoted above contravenes the law of the case as adjudged by the Supreme Court on the former appeal in this case.

"Particular No. 8. To strike out and suppress from the entry of judgment the following words, to-wit: 'It is further considered, ordered, adjudged and decreed that when the sale or sales hereof provided for have been made, said trustee shall apply the proceeds of said sale or sales as follows: (1) To the payment of the costs of this action; (2) to the payment of any mortgage or other lien, charge, adverse interest or incumbrance upon and against said real estate or any part of any of said real estate above described, which may be prior and superior and adverse to the interest of said Fidelity Trust Company, trustee; (3) to the payment to said Fidelity Trust Company of the judgment on account herein decreed in the sum of Fifty Thousand Six Hundred Ninety-Seven Dollars (\$50,697.00); (4) to the reimbursement of said Fidelity Trust Company of any sum or sums which may accrue to it in the execution of said trust, after the date of this judgment and decree; (5) the rest and residue of any money derived from said sale or sales shall be paid to said Dora E. Rooker, her heirs, executors, administrators and assigns, and for cause plaintiffs say that so much of said entry of judgment as quoted above contravenes the law of the case as adjudged by the Supreme Court on the former appeal in this case.

53. And plaintiffs further say that each and every objection and motion and plea by them made in composing the issues in said circuit court was overruled and denied and that in each instance an exception by these plaintiffs was noted duly of record.

54. And plaintiffs say and would show unto the court that in due time thereafter they filed in said Circuit Court their motions for a new trial including therein the several assignments of error that in its respective rulings on the admission and exclusion of evidence said trial court erred; that each the sixth (6th), seventh (7th), eighth (8th), tenth (10th), eleventh (11th), twelfth (12th), thirteenth (13th), fourteenth (14th), fifteenth (15th), sixteenth (16th), seventeenth (17th), eighteenth (18th), nineteenth (19th), and twentieth (20th) findings was not sustained with sufficient evidence; also, that each of said findings was contrary to law; also, for error in the assessment of defendants' damages, the same being too large; also, for error in the assessment of plaintiffs' damages, being too small; that thereupon said motion for new trial was overruled whereupon plaintiffs prayed an appeal in term to the Supreme Court of Indiana, which prayer was granted upon the condition that plaintiffs should file in said cause within thirty (30) days their appeal bond in the sum of Sixty-Five Thousand Dollars (\$65,000.00) with a named surety and sixty (60) days' time was given plaintiffs in which to file all bills of exceptions.

55. And plaintiffs say and would show unto the court that the penal sum of said appeal bond was exorbitant and oppressive and was imposed for the purpose of defeating a term time appeal and [fol. 111] to obstruct the administration of justice and that plaintiffs were unable to give said bond but thereafter they did perfect

vacation appeal of said cause in which they assigned errors to the effect, following:

First. The court erred in overruling the plaintiffs' motions to strike out the second amended counter claim of the defendants, to which ruling of the court the plaintiffs at the time excepted.

Second. The court erred in overruling the plaintiffs' demurrers to the second amended counter claim, to which ruling of the court the plaintiffs at the time excepted.

Third. The court erred in overruling the plaintiffs' motion to make more certain and specific the second amended counter claim, to which ruling of the court the plaintiffs at the time excepted.

Fourth. The court erred in overruling the plaintiffs' demurrers to the supplemental second amended counter claim, to which ruling of the court the plaintiffs at the time excepted.

Fifth. The court erred in overruling the motion of the plaintiffs for judgment on the special findings of fact, to which ruling of the court the plaintiffs at the time excepted.

Sixth. The court erred in each of the following numbered conclusions of law, to each of which conclusions of law severally and separately considered the plaintiffs at the time excepted, namely, the first, the second, the third, the fourth, the fifth and the sixth conclusions of law.

[fol. 112] Seventh. The court erred in overruling the plaintiffs' motions to modify the judgment, to which ruling of the court the plaintiffs at the time excepted.

Eighth. The court erred in overruling the plaintiffs' motions for new trial, to which ruling of the court the plaintiffs at the time excepted.

Wherefore the appellants, who were plaintiffs in said cause in said court below, pray that the judgment of said Hamilton Circuit Court of Indiana, given and rendered in said cause, be in all things reversed and appellants pray for all proper relief.

56. And plaintiffs say and would show unto the court that on June 22, 1921, the Supreme Court of Indiana rendered its second opinion in this cause in substance, to wit:

"Wiloughby, J.—This case is a resumption of proceedings under the mandate of this court in *Rooker vs. Fidelity Trust Company*, 185 Ind. 172. The appellants as settlers of a trust in lands sued appellee, who was the trustee alleging a violation and repudiation of the trust and demanding damages, an accounting, that the appellee trustee be removed, and that a receiver be appointed for the trust estate to administer it under the terms of the trust agreement. Appellee on its part filed a cross-complaint in which it set up the same trust and its duties under it as trustee, its performance of all its duties save the sale of the trust estate, its reasons for not making such sale, its purpose to carry out the sale and its hindrance by appellants' interference and claim of title. It asked an accounting [fol. 113] that its title as trustee be quieted, that appellants be enjoined and that it be decreed to make sale pursuant to the trust agreement and distribution of proceeds accordingly.

"Appellants' complaint was answered by appellee trustee by general denial. Issue was formed on the cross-complaint of appellee trust company by answer of general denial and by special part answers, the issues on the latter being made by replies in general denial. On these issues the cause was submitted to the court for trial, and the following special finding of facts and conclusions of law were made and stated by the court.

"The court finds the facts to be: First, that on and prior to the 11th day of October, 1909, the plaintiff, Dora E. Rooker, was the owner in fee simple of certain real estate situate in Hamilton County, Indiana. Second, that on and prior to the 11th day of October, 1919, the plaintiffs, William V. Rooker and Dora E. Rooker, husband and wife, were the owners in fee simple, as tenants by entirety of certain real estate situated in Marion County, Indiana. Third, that on the said 11th day of October, 1909, said plaintiffs, Dora E. Rooker and William V. Rooker, her husband, executed and delivered to said cross-complainant, Fidelity Trust Company as trustee, the warranty deed for the lands in Hamilton County.

"To have and to hold, said real estate, however in trust for the use and benefit of said Dora E. Rooker and to protect and discharge the obligations arising out of claims and liens or the right of lien by reason of improvements made on the above described real estate [fol. 114] "Said Fidelity Trust Company of Indianapolis, Indiana as aforesaid, to sell and convey said lands or any part of them at such prices and upon such terms as may be from time to time dictated in writing by said Dora E. Rooker; to execute the proper trustee deed or deeds conveying the title thereto in fee simple to the purchaser; it being hereby understood and agreed that any deed executed by said Fidelity Trust Company of Indianapolis, shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as this grantor could herself do, and any such purchaser or purchasers shall in no wise be responsible for the application of the proceeds arising from such sale in the hands of the said Fidelity Trust Company of Indianapolis, Trustee.

"And said Fidelity Trust Company of Indianapolis, as such trustee shall have full power and authority to make contracts in writing for the sale of the foregoing real estate, or any part or all of said real estate and convey same free and clear of any incumbrance or convey the same subject to any existing incumbrances.

"And to do any and all acts and to execute any and all papers which may be necessary to protect the interests of this grantor, the mortgage and other lien holders in and to said real estate and to conserve the trust hereby created.

"And in the event any such liens or charge against said real estate be paid by the Fidelity Trust Company, Trustee, the said Fidelity Trust Company, Trustee, shall be subrogated to all the rights of such original lien holders and the same shall be enforceable by it and collectible with interest at the rate of six per cent (6%) per annum, to be credited semi-annually as a debit and charge against said real estate.

"This conveyance is made subject to the taxes for the years 1908 and 1909 and subject to a certain mortgage executed to the American Central Life Insurance Company by this grantor and William V. Rooker, her husband, on November 19th, 1908. Said mortgage secured the payment of certain principal note of said grantor in the sum of Fourteen Thousand Dollars (\$14,000.00) together with interest thereon and recorded in mortgage record 52, page 84, in the Office of the Recorder of Hamilton County, Indiana.

"That said Indenture by Dora E. Rooker and William V. Rooker, her husband, was received for record on the 14th day of October, 1909, and recorded in record 97, at page 117, in the Recorder's Office of Hamilton County, Indiana.

"Fourth. That on said 11th day of October, 1909, the plaintiffs, William V. Rooker and Dora E. Rooker, husband and wife, executed and delivered to said cross-complainant Fidelity Trust Company as trustee, their warranty deed for the lands in Marion County.

"To have and to hold said real estate, however in trust for the use and benefit of said grantors, William V. Rooker and Dora E. Rooker, and to protect and discharge the obligations of the trust herein with [fol. 116] the powers and limitations as follows:

Said Fidelity Trust Company of Indianapolis, Trustee, as aforesaid to sell and convey said real estate according to the terms of a certain contract of even date herewith, within one (1) year after the date of these presents for a consideration fixed in said contract and should it so happen that said real estate be not sold within said period of one (1) year, for the sum nominated in said contract, then after ninety (90) days' notice in writing, to be given to the grantors by the trustee herein, the trustee may publicly advertise said real estate and sell the same at public or private sale at such price as it may bring and upon the consummation of such sale as may be made by said Fidelity Trust Company of Indianapolis, as such trustee to execute the proper trustee's deed conveying the title thereto in fee simple to its said purchasers. It being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis, Trustee, shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as these grantors could themselves do, and any such purchaser or purchasers shall in no wise be responsible for the application of the proceeds arising from such sale in the hands of the said Fidelity Trust Company of Indianapolis, Trustee, but said Fidelity Trust Company is directed to apply the proceeds, arising from such sale in the manner and for the purpose set out in the contract entered into between said grantors and said Fidelity Trust Company, trustee, on this date.

[fol. 117] "The said Fidelity Trust Company of Indianapolis, as such trustee shall have full power and authority to make contracts in writing for the sale of the foregoing real estate or any part or all of said real estate and convey the same free and clear of any incumbrances or subject to any existing incumbrances, and to do any and all acts and to execute any and all papers which may be necessary to protect the interest of the grantors in and to said real estate and to con-

serve the trust hereby created and it is hereby further understood and agreed that if the said Fidelity Trust Company of Indianapolis, as Trustee, shall elect to pay any lien, charge or incumbrance existing against said real estate, the said Fidelity Trust Company, Trustee, shall be subrogated to all the rights, title and interest held by the original parties thus paid and the same shall be collectible and enforceable in its hands, together with interest thereon at the rate of six per cent (6%) per annum, to be credited semi-annually to said Fidelity Trust Company as a debit and charge against the grantors and the real estate above described.

"This conveyance is made subject to the taxes for the years 1908 and 1909 and subject also to certain mortgage executed March 12, 1909, by the grantors, William V. Rooker and Dora E. Rooker, husband and wife, to the Indianapolis Life Insurance Company to secure the payment of one principal note of the sum of Six Thousand Dollars (\$6,000.00) and interest coupon notes thereon which mortgage is recorded in mortgage record 523, page 128, in the Office of the Recorder of Marion County, State of Indiana.

[fol. 118] "That this Indenture was received for record on the 14th day of October, 1909, and recorded in Record 52, page 101 in the Office of the Recorder of Marion County, Indiana.

"Fifth. That contemporaneously with the execution of the two warranty deeds executed on the 11th day of October, 1909, to said Fidelity Trust Company, Trustee, and as part of the same transaction the plaintiffs, Dora E. Rooker and William V. Rooker, as first parties, and the defendant and cross-complainant, Fidelity Trust Company of Indianapolis, Indiana, as second party, executed in duplicate on the 11th day of October, 1909, a memorandum or contract in writing. (This memorandum or contract in writing is set out in full in the opinion in Rooker vs. Fidelity Trust Company 185 Ind. beginning page 173).

"Sixth. That since the execution of said warranty deeds and said written memorandum, the plaintiff, Dora E. Rooker, has continued in the possession of and farmed all the lands situated in Hamilton County, Indiana, and is now in possession thereof, and that the plaintiffs, William V. Rooker and Dora E. Rooker, have continued in the possession of and farmed all of the real estate situated in Marion County, Indiana, and are now in possession thereof.

"Seventh. That ever since the execution of said warranty deed and the execution of said written memorandum the plaintiff, Dora E. Rooker, has received all of the proceeds arising out of the Hamilton County real estate and has not at any time rendered an accounting [fol. 119] ing to the Fidelity Trust Company, Trustee, and the plaintiffs, William V. Rooker and Dora E. Rooker, have received the proceeds arising out of the Marion County real estate and have not at any time rendered an accounting to the Fidelity Trust Company Trustee.

"Eighth. That Fidelity Trust Company, Trustee, has not sold or conveyed any of the real estate conveyed to it by plaintiffs and that the title of the same is now in the said Fidelity Trust Company Trustee, and that said Fidelity Trust Company is not claiming

asserting any other title than the title and right set forth in the deeds of conveyance and memorandum of trust, hereinbefore set out in these findings.

"Ninth. That prior to the commencement of plaintiffs' action, namely, on or about the 15th day of October, 1912, the defendant and cross-complainant, Fidelity Trust Company, Trustee, served a written notice upon the plaintiffs demanding the payment of certain sum aggregating Nineteen Thousand Six Hundred Dollars and Four Cents (\$19,604.04) and tendered for delivery its quit claim deeds conveying and quit claiming said Hamilton County and Marion County lands to the original grantors upon the payment of the aforesaid sum upon demand and stating that said quit claim deed will remain in the Office of Fidelity Trust Company for delivery until October 30, 1912, upon payment of the demand.

"Tenth. That the plaintiff, Dora E. Rooker, in the constructing of her dwelling house on the Hamilton County land contracted large [fol. 120] liabilities to various persons, firms and corporations for work and labor done and material furnished for and used in said construction, and for large sums of money borrowed and used in said construction, and also contracted certain liabilities in her farming operations. That said Fidelity Trust Company, Trustee, under said contract and upon the security evidenced by said two separate warranty deeds and agreement of trust, all executed and delivered October 11, 1909, did from time to time thereafter upon the written order and direction of the plaintiff, Dora E. Rooker, first pay out the total sum of Six Thousand Dollars (\$6,000.00) and did further, after paying on the written order and direction of said Dora E. Rooker the total sum of Six Thousand Dollars (\$6,000.00) let out and expend a large sum of additional money to protect its interests in and to said real estate and conserve the property. That the written orders of the plaintiff, Dora E. Rooker, issued from time to time to the defendant and cross-complainant, Fidelity Trust Company, directing the payment of certain obligations showing on their face the nature of the claim, the amount thereof, and the party to whom payment should be made, and that the signature affixed thereon is the signature of the plaintiff, Dora E. Rooker.

"Eleventh. That said Fidelity Trust Company made payment on such written orders issued from time to time by plaintiff, Dora E. Rooker, which payments are evidenced by vouchers signed by the plaintiff, Dora E. Rooker, and receipted by the respective parties in whose favor the voucher is drawn aggregating the sum of Fifteen Thousand Eight Hundred Thirteen Dollars and Twenty-one Cents (\$15,813.21).

[fol. 121] "Twelfth. The said Fidelity Trust Company laid out and expended pursuant to said trust agreement the following additional amounts aggregating the sum of Twenty-one Thousand One Hundred Ninety-four Dollars and Twenty-seven Cents (\$21,194.27).

"Thirteenth. That no assets came into the possession of the Trustee other than lands described and that all the moneys paid out by the defendant cross-complainant was the money of the Fidelity Trust Company, of Indianapolis, Indiana, a corporation engaged in

the business of operating a trust company under the laws of the State of Indiana, and that no part of the amount paid out and advanced has ever been repaid, and that the full amount paid out and advanced, less credits hereinafter allowed, remains wholly unpaid.

"Fourteenth. That under the agreement between the two parties the defendant and cross-complainant, Fidelity Trust Company, Trustee, is entitled to have and receive for its compensation, a trustee's fee of One Hundred and Fifty Dollars (\$150.00), which has been charged against the plaintiffs by the written order of Dora E. Rooker; a commission of two (2) per cent on loans and advancements and all moneys laid out and expended, of which One Hundred and Twenty Dollars (\$120.00) has been charged against the plaintiffs by the written order of Dora E. Rooker; and that said defendant and cross-complainant is further entitled to have and receive interest on all moneys loaned or advanced at the rate of six (6) per cent per annum.

"Fifteenth. That the plaintiffs are entitled to the following credits, to wit: Ninety-five Dollars (\$95.00), together with interest thereon [fol. 122] at six (6) per cent from October 16, 1909, on account of the cancellation of insurance policy of Six Thousand Dollars (\$6,000.00), said sum having been charged against plaintiffs under the order and voucher dated October 16, 1909; also a credit of Five Hundred Dollars (\$500.00) with interest at four (4) per cent from August 26, 1910, less Fifteen Dollars (\$15.00) deducted from the principal amount as a premium upon the Surety Company Bond, being the proceeds of the certificate of deposit deposited with the Illinois Surety Company as collateral on a supersedeas in the case of William V. Rooker and Dora E. Rooker vs. Ludowici Caladon Company in the appellate court, which cause was affirmed on appeal and upon the judgment being paid said security returned; also a rebate of Four Hundred and Two and 81/100 Dollars (\$402.81) representing the various amounts of penalties and costs including in various payments for taxes on the Marion County Lands.

"Sixteenth. There is now due and owing to the defendant and cross-complainant herein from the plaintiffs cross defendants herein, the principal sum of Thirty-seven Thousand and Seven and 48/100 Dollars (\$37,007.48); and for the interest thereon, the aggregate sum of Fourteen Thousand Two Hundred and Seventy-one and 29/100 Dollars (\$14,271.29); and for commission at two (2) per cent on all funds paid out in excess of Six Thousand Dollars (\$6,000.00) the aggregate sum of Six Hundred and Twenty and 14/100 Dollars (\$620.14) from which there shall be deducted the aggregate sum of Nine Hundred Eighty-two and 81/100 Dollars (\$982.81), together with interest thereon amounting to Two Hundred and Eighteen and 51/100 Dollars (\$218.51), being the credits set out in the preceding finding, leaving a net aggregate balance due and owing to the defendant and cross-complainant herein in the sum of Fifty Thousand Six Hundred and Ninety-seven and 59/100 Dollars (\$50,697.59).

"Seventeenth. That all the amounts advanced and paid out by the defendant Fidelity Trust Company, Trustee, as hereinbefore set out were advanced and paid out by it under and pursuant to said memorandum and agreement of trust and the deeds of conveyance, hereinbefore set out, to protect and preserve the trust estate and were so paid out for the personal use and benefit of the plaintiff, Dora E. Rooker, and her separate estate and were received by her and applied for such purpose and said Fidelity Trust Company, Trustee, is entitled to reimburse itself therefor according to the terms of said trust agreement by the sale of said lands therein provided.

"Eighteenth. That on the 21st day of June, 1917, the defendant Fidelity Trust Company, as Trustee, served a notice upon William V. Rooker and Dora E. Rooker of which the following is a copy:

"To William V. Rooker and Dora E. Rooker:

"Pursuant to the provisions of the deed of conveyance executed to the undersigned as Trustee, on the 11th day of October, 1909, conveying to the undersigned as Trustee, the following described real estate in Marion County, State of Indiana, to wit: The southeast quarter of the northeast quarter of section thirty-three (33), Town-[fol. 124] ship seventeen (17), north, Range four (4), east, containing forty (40) acres more or less; also the southwest quarter of the northwest quarter of Section thirty-four (34), Township seventeen (17), north, Range four (4), east, containing forty (40) acres, more or less, and the memorandum executed concurrently therewith, notice is hereby given that the Fidelity Trust Company as Trustee will ninety (90) days after the delivery hereof, publicly advertise said real estate and sell the same at the highest price obtainable and upon the consummation of a sale, the undersigned as such trustee will execute to the purchaser a proper trustee's deed conveying the title thereto in fee simple to the purchaser. Dated at Indianapolis, Indiana, this 21st day of June, 1917.

Fidelity Trust Company, Trustee, By W. M. Fogarty, President. Attest: James G. Flaherty, Secretary."

"Nineteenth. That after the execution of said deeds of conveyance and written memorandum set forth in paragraphs of this finding designated third, fourth and fifth, and prior to the demand for repayment and tender of deed for reconveyance set forth in the ninth paragraph of this finding, the plaintiff, William V. Rooker acting for himself and his wife, and co-plaintiff, Dora E. Rooker, did on several occasions express and convey to defendant, the Fidelity Trust Company, their intentions to pay off the advancements, more specifically set forth in this finding, theretofore made by it under said [fol. 125] deeds and memorandum and take reconveyance of said land and otherwise by their course and conduct did induce said demand for repayment and tender of reconveyance.

"Twentieth. That said Fidelity Trust Company, Trustee, used all due diligence to sell said lands mentioned and described herein in accordance with the provisions of said trust agreement, hereinbefore

set out, but that said Marion County lands were not sold within one (1) year after the execution of said memorandum and deeds, and have not yet been sold by said trustee under said trust provisions; that ninety (90) days' notice in writing was given, as set forth in the previous findings, notifying the plaintiffs of the proposed sale of said Marion County lands under said trust agreement; that the plaintiffs have been, were then and are now asserting an interest in said lands adverse to the rights of said Trust Company, as Trustee, and are now disputing and denying its right to make sale of such lands under and pursuant to the terms of the deed of conveyance and said memorandum of trust agreement, and are likewise now asserting an interest in the Hamilton County lands, adverse to the right of the said Trust Company, as Trustee, and are disputing and denying its right to make sale of such lands under and pursuant to the terms of said deed and the memorandum of trust agreement recited in the finding above.

"That the plaintiffs, in open court, have disputed and now deny the right of the said Trust Company as Trustee, to sell the lands conveyed to it in trust, and are actively opposing such efforts to sell and [fol. 126] now are resisting the sale of said lands or any of them by said Trustee, and are now prosecuting an appeal in the appellate court from a judgment of the Marion Circuit Court, quieting the title of the Marion County lands in said Fidelity Trust Company as Trustee, and enjoining the plaintiffs herein from denying or disputing the title of said Fidelity Trust Company as Trustee to said Marion County lands and from denying, disputing, obstructing or interfering with the sale of said lands under and pursuant to its power of sale contained in the memorandum of trust.

"That the assertion of interest in said lands by plaintiffs as herein above stated adverse to the interest of Fidelity Trust Company as Trustee under said trust agreement is unfounded and without right. Upon the foregoing facts the court states the following conclusion of law:

"1. The law is with the defendant on the issues joined on plaintiffs' complaint.

"2. The law is with the cross-complainant on the issues joined on the defendant's cross-complaint.

"3. The legal title to the lands described in the deeds and instrument of trust set out in the finding of facts is held and vested in defendant and cross-complainant, Fidelity Trust Company, Trustee, with full power to convey the same in fee simple and apply the proceeds pursuant to the terms of said trust, and said defendant is entitled to have its title quieted and to have injunction to protect the same and to restrain plaintiffs from interfering with defendant in carrying out the terms of said trust agreement.

[fol. 127] "4. The defendant and cross-complainant, Fidelity Trust Company, is entitled to proceed with the sale of said lands according to the terms of said deed and trust agreement and to apply the proceeds as therein provided.

"5. The defendant and cross-complainant is entitled to judgment on account in the sum of Fifty Thousand Six Hundred and Ninety-seven Dollars (\$50,697.00) to be paid out of the proceeds of such sale according to the terms of such deeds and trust agreement.

"6. The defendant and cross-complainant is entitled to recover its costs in this action taxed at \$—.

"The court having found the facts specially and stated its conclusion of law thereon, now renders judgment accordingly.

"It is therefore considered, ordered, adjudged and decreed by the court that the plaintiffs take nothing in this action except as hereinafter provided in the distribution of the proceeds of the sale of the lands comprising the trust estate hereinafter described.

"It is further considered, ordered, adjudged and decreed that the defendant and cross-complainant, Fidelity Trust Company has not mismanaged, repudiated or abandoned its trust, but has faithfully performed its duties as trustee, under the deeds and trust agreement set out in the pleadings and special findings, by advancing large sums of money for improvements on the lands of said trust estate and to free and preserve said estate from dissipation through liens and incumbrances, by taking proper steps under said instruments to [fol. 128] sell the same and otherwise, and now holds the legal title to said lands as trustee for the sole purpose of completing its duties and obligations, as such trustee, by making sale of the same and by making distribution of the proceeds according to the terms of said deeds and trust agreement and not otherwise, and in no other capacity. That said defendant and cross-complainant, Fidelity Trust Company, as such Trustee, holds the legal title to said lands and the appurtenances thereunto belonging, and is fully and lawfully empowered and under the duty to sell and convey said lands, by deeds of warranty of the fee simple title, and give full possession of the same, which lands are described as follows:

"All of the west half of the north half of section eighteen, (18) township eighteen (18), north, range five (5), east, lying west of the Lake Erie and Western Railroad, containing ninety-two (92) acres more or less.

"Also the southwest quarter of section seven (7), township eighteen (18) north, range five (5), east, lying west of the Lake Erie and Western Railroad and east of White River, containing forty-eight (48) acres, more or less.

"Also the southeast quarter of section twelve (12), township eighteen (18) north, range four (4), east, containing sixty (60) acres, more or less, and lying south and east of White River.

"Also that part of the northeast quarter of section thirteen (13), township eighteen (18), north, range four (4), east, more particularly described as follows:

[fol. 129] Beginning at the northeast corner of said section and running thence west with said section line one hundred and thirty-two (132) rods more or less, to White River; thence southerly along said stream with the meanderings thereof to a point 39.95 rods south of the north line of said section; thence east 65.80 rods; thence south

73.15 rods; thence east 68.25 rods; thence north 115.20 rods to the place of beginning, containing seventy-five (75) acres, more or less, situated in Hamilton County, Indiana.

"And the southeast quarter of the northeast quarter of section thirty-three (33), township seventeen (17) north, range four (4), east, containing forty (40) acres, more or less.

"Also the southwest quarter of the northwest quarter of section thirty-four (34), township seventeen (17) north, range four (4), east, containing forty (40) acres more or less situated in Marion County, Indiana.

"It is further considered, ordered, adjudged and decreed that said Fidelity Trust Company, Trustee, is entitled to judgment on this account against said trust estate to be paid out of the proceeds of the sales of the lands so held in trust by it, as hereinbefore provided, in the sum of Fifty Thousand Six Hundred Ninety-Seven Dollars (\$50,697.00).

"It is further considered, ordered, adjudged and decreed that said plaintiffs, Dora E. Rooker and William V. Rooker, by said deeds of conveyance and trust agreement have parted with all their title [fol. 130] to said real estate and appurtenances thereunto belonging, and the right to the possession thereof and the use, rents and profits thereof and have no interest therein other than in such proceeds of the sale thereof as may remain to be distributed to the said Dora E. Rooker, under this judgment and said trust agreement. That any other interest in or control over said lands than said interest in the proceeds, aforesaid, heretofore and now being asserted by said plaintiffs, adverse to the title of said trustee is wrongful, without right and unfounded and obstructive of the completion of the execution of said trust by said trustee, and said Dora E. Rooker and William V. Rooker be and they are, each and both hereby perpetually enjoined from denying or disputing the said title of the said Fidelity Trust Company, as Trustee, to said lands above described and its right to the possession, use and rents and profits thereof, and from denying, disputing, obstructing or in any manner interfering with the sale of said lands by said trustee under and pursuant to its power of sale, conferred by said deeds and trust agreement, and from refusing to give possession and from in any manner interfering with, disputing or obstructing said trustee or any purchaser or purchasers in giving possession or in taking possession when sale shall have been made of said lands, as aforesaid.

"It is further considered, ordered, adjudged and decreed that said Fidelity Trust Company as such Trustee proceed under the power and according to the terms of said deeds and trust agreement and make and complete sale of said above described lands, convey the [fol. 131] same by warranty deeds in fee simple and put the purchaser or purchasers thereof in possession; that said Marion County lands having failed to sell for the sum of Eighteen Thousand Dollars (\$18,000.00) in the first year after the execution of said deeds and trust agreement or thereafter, said trustee having given the written notice to said plaintiffs and the notice by public advertisement, pro

vided for by said trust agreement and deeds, shall proceed to sell and convey said Marion County lands above described, forthwith for whatever sum they may bring, using diligence to procure the highest and best price obtainable therefor; that if said Marion County lands do not sell for lack of a bid, then said Trustee shall, after giving said plaintiffs ninety (90) days' notice in writing of their intention to do so, sell and convey said Hamilton County lands for whatever sum they will bring over and above the upset price of Sixty-Five Thousand Dollars (\$65,000.00); that if said Hamilton County lands do not sell for said sum of Sixty-Five Thousand Dollars (\$65,000.00), for lack of a bid for that sum, then said trustee, after ninety (90) days' notice in writing to the plaintiffs of their intention to do so, shall sell said Marion County lands at public auction for whatever sum and price they may bring, using diligence to procure the highest and best price obtainable therefor; that if upon any sale of the Marion County lands, under this decree they do not fetch enough to pay the moneys and perform the obligation against said trust estate, in this action found to exist and to be done, then said trustee shall after giving thirty (30) days' notice to said plaintiffs of their intention so to do, proceed to sell, and sell and convey said Hamilton County lands for whatever sum and price they will bring using diligence to procure the highest and best bid therefor. That any sale or sales made under this decree shall be forthwith submitted to this court for approval or disapproval.

"It is further considered, ordered, adjudged and decreed that when the sale or sales herein provided for have been made, said trustee shall apply the proceeds of said sales as follows:

"1. To the payment of the costs of this action.
 "2. To the payment of any mortgage or other valid liens, charge, adverse interest or incumbrance upon and against said real estate or any part of any of said real estate above described, which may be prior and superior and adverse to the interest of said Fidelity Trust Company, Trustee.

"3. To the payment of said Fidelity Trust Company of the judgment on account herein decreed in the sum of Fifty Thousand Six Hundred Ninety-Seven Dollars (\$50,697.00).

"4. To the reimbursement of said Fidelity Trust Company any sum or sums which may accrue to it in the execution of said trust, after the date of this judgment and decree.

"5. The rest and residue of any money derived from said sale or sales shall be paid to the said Dora E. Rooker, her heirs, executors, administrators and assigns.

"From this judgment and decree appellants appeal and allege errors relied on for reversal as follows:

"1. In overruling motions to strike out the appellee's second amended counter-claim.

[fol. 133] "2. In overruling the demurrers to the second amended counter-claim for insufficiency of facts.

"3. In overruling motion to make second amended counter-claim more specific.

"4. In overruling appellants' motion for judgment on the special findings.

"5. The trial Court erred in its conclusions of law.

"6. In overruling appellants' motion to modify the judgment.

"7. In overruling appellants' motion for a new trial.

"The first error relied on for reversal by appellants is the overruling of motions to strike out the entire second amended counter-claim and cross-complaint of appellee. An examination of the record discloses that the pleading to which reference is here made was appellee's cross-complaint as amended after the decision of this court in the case of *Rooker vs. Fidelity Trust Company*, 185 Ind. 172.

"The argument presented by the appellants in favor of these motions is substantially that on account of the former decision of the Supreme Court in this case and the exhibits attached to said cross-complaint no sufficient cross-complaint or counter-claim could have been written against appellants. This phase of the case need not be discussed in disposing of these motions for it is settled law that error can not be predicated upon the action of the court in overruling a motion to strike out a part or all of a pleading.

Woodhams vs. Jennings, 164 Ind. 555;

Pfau vs. State ex rel. 148 Ind. 539.

[fol. 134] "In support of their second alleged error appellants claim that the appellee trust company could not in any event, by counter-claim sue the appellants on the subject matter of the trust estate on the facts set upon in the counter-claim for the reason that the counter-claim is not relevant or germane to the complaint.

"The arguments presented by appellant in favor of their demurrers are in substance that the appellee was guilty of wrongful management of the trust property and sought to acquire title to it by wrong doing and that the trustee elected to repudiate the trust agreement and have the trust deed declared a mortgage and that by reason of having failed to succeed the rights of the trustee were lost and it has no right to recover the sums of money expended by it for the use and benefit of the appellants.

"A counter-claim is any matter arising out of or connected with the cause of action which might be the subject of an action in favor of the defendant or which tend to reduce the plaintiff's claim or demand for damages. *Burns* 1914, 355.

"A counter-claim is good and germane to the principal case if it alleges matters connected with the subject of the original action.

Stanley vs. N. W. Ins. Co., 95 Ind., 254.

Excelsior Clay Works vs. De Camp, 40 Ind. App., 26.

"A counter-claim under code provisions like ours is the equivalent of the cross bill in equity and in addition includes common law recoupment.

Woodruff vs. Garner, 27 Ind., 4.

[fol. 135] "The purpose of a cross bill is to obtain full relief for all parties and a complete determination of all controversies which

rise out of the matters charged in the original bill.—10 R. C. L. p. 83.—261 et seq.

"In this case the transaction having been brought into a court of equity by appellants it was not only the right of the court to enter a cross bill which would settle all the rights of all the parties in all of their relations in the subject matter, but it was the duty of the court if necessary, to require a cross bill to be filed which would enable it to completely settle the controversy. See *Sims vs. Burk*, 99 Ind., 214.

"A party who imagines he has two or more remedies or who misconceives his rights is not deprived of all remedy because he first tries a wrong one.

Bunch vs. Graves, 111 Ind., 351.

Nave vs. Powell, 62 Ind. App., 274.

"The doctrine of election of remedies is of equitable origin. It has no application to the circumstances of this case for to apply it here would work to the great harm and loss of the appellee trust company, and the unearned and undeserved large money benefits to appellants, moreover it does not apply unless in fact, two remedies are available, which is not true in this case, as the Supreme Court has decided in 185 Ind., 172. The court did not err in overruling the demurrers to the second amended counter claim.

"In support of their third alleged error the appellants argue at length that the counter-claim was illegal. The object of a motion to make a pleading more specific is to require the pleader to state with [vol. 136] certainty what is vaguely stated in the pleading.

Elliott's App. Proc., 665.

Failey vs. Gribbling, 128 Ind., 110.

"The appellee, in its counter-claim set up very fully and in circumstantial detail the trust and its relation of it, and its title and claims as trustee, and the items of its account and the circumstances requiring the aid of the court in finally carrying out and closing the trust. There is no uncertainty or vagueness of statement and it is not claimed by appellants that there is. Their motion is based on what they call the illegality of the claim. The court did not err in overruling their motion to make more specific.

"The fourth error relied on for reversal by appellants is that the court erred in overruling plaintiffs' motion for judgment in their favor on the special finding of facts. A motion for judgment on a special finding of facts is not recognized by our practice. It is elementary that the sufficiency of the evidence to sustain the finding is tested by a motion for a new trial and that questions of law raised by the conclusions of law stated on a finding can be presented only by exceptions taken to the conclusions of law. The court did not err in overruling appellants' motion for judgment on the special finding of facts.

"It appears from the record that after the court filed its special finding of facts and conclusions of law thereon, the plaintiffs each respectively moved the court for judgment in their favor on the

special finding of facts and when such motions were overruled they excepted to the conclusions of law. Under such circumstances the exceptions are not available.

[fol. 137] "Exceptions to conclusions of law upon facts specially found must be taken before the taking of any other step in the cause by the excepting party.

Dickson et al. vs. Rose, 87 Ind., 103;

See also Barner vs. Bayless, 134 Ind., 600;

Chicago R. R. vs. State ex rel., 159 Ind., 237;

Medical College vs. Commingore, 140 Ind., 296.

"Though it was taken on the same day that the ruling was made, an exception will not be available if it was not taken until after additional steps in the prosecution or defense of the case had been taken by the party reserving it. Ewbank's Manual (2d Ed.) 24b.

Dickson vs. Rose, 87 Ind., 103;

Barner vs. Bayless, 134 Ind., 600.

The correctness of the conclusions of law cannot be questioned by a motion to modify the judgment, nor does such motion present any question if the judgment rendered conforms to the conclusions of law. Chicago S. E. Ry. Co. vs. State ex rel, 159 Ind., 237. The judgment rendered in this case was in conformity with the conclusions of law.

The seventh error relied on for reversal by appellants is that the court erred in overruling their motion for a new trial. In support of their contention to show that the court erred in overruling said motion the appellants say that the cause was put at issue and tried on an unlawful cross-complaint; and that therefore the judgment was contrary to law. This contention was decided adversely to appellants in our ruling on the demurrers to the cross-complaint and counterclaim. The brief of appellants does not contain a condensed recital of the evidence in narrative form as required by the rules.

[fol. 138] A statement of the evidence mixed with statements and arguments of counsel, propositions of law and citation of cases and which clearly does not purport to cover the entire evidence, does not comply with the rules of this court and does not command a consideration of a motion for a new trial involving the evidence. Rose vs. City of Jeffersonville, 185 Ind. 577 and cases there cited.

No question is presented on the sufficiency of the evidence. Judgment affirmed.

57. And plaintiffs say and would show unto the court that in due time and manner these plaintiffs thereafter presented to the Supreme Court of Indiana in said cause their petition for a rehearing which upon consideration was denied; that thereupon these plaintiffs presented to the Supreme Court of the United States their petition for a writ of certiorari to be issued out of said Supreme Court to fetch up the record of said Supreme Court of Indiana in said cause for examination and review, but said petition for certiorari was denied; that thereupon these petitioners sued out their writ of error in the Supreme Court of the United States directed to the Supreme

Court of Indiana for the examination and determination of the questions arising upon said record, but thereafter said writ of error was dismissed on the stated ground that among said questions presented for review there was no Federal question and therefore no ground for the jurisdiction of the Supreme Court of the United States; and of these things these plaintiffs inform this Honorable Court in the [fol. 139] purpose and to the end that the Court may be advised that these plaintiffs seek equity because of the absence of a remedy at law for redress of the wrongs inflicted upon them in and by the second opinion and judgment of the Supreme Court of Indiana affirming the second opinion and judgment of said Hamilton Circuit Court, and approving said judgment of said Marion Circuit Court.

58. And these plaintiffs say and would show unto the court that among the wrongs inflicted upon them in and by the second opinion and judgment of the Supreme Court of Indiana affirming the second opinion and judgment of said Hamilton Circuit Court and the judgment of said Marion Circuit Court are the following, to wit:

A. Within the province and under the sole authority of said Amended Act of March 5, 1915, said Hamilton Circuit Court assumed and exercised the power to act arbitrarily and to exercise a discretion not within the law and thereupon said Hamilton Circuit Court falsely construed the mandate of the Supreme Court of Indiana, on said first appeal to men, not that said cause should be retried upon the issues, as said mandate had in fact and in law directed should be done, but to mean that said Circuit Court might, could and should pursue arbitrarily and capriciously any purpose of its own in the premises and thereby impair the obligation of said trust agreement, and the concurrent deeds, by denying and withholding from said trust agreement and from said trust deeds the usual and ordinary remedies and processes of the law of trusts, which remedies and processes had been and were allocated to said contract and deeds and became of their obligation in and by said first opinion of said Supreme Court on said first appeal; that forasmuch as said Amended Act of March 5, 1915, wrongfully pretended to and did authorize said Hamilton Circuit Court to disregard, arbitrarily and capriciously, the said first opinion and mandate of said Supreme Court in this cause said Amended Act did impair the obligation of said contract, viz. said trust agreement and trust deeds, in contravention of Article I, Section 10 of the Constitution of the United States. And forasmuch as said Hamilton Circuit Court, on the retrial of said cause, arbitrarily and capriciously, followed and carried out the provisions of said Amended Act of March 5, 1915, said Hamilton Circuit Court did deny and withhold from said trust agreement and said trust deeds the usual and ordinary remedies and processes of the law of trusts, which remedies and processes had been and were allocated to said contract and deeds and became of their obligation in and by said first opinion of said Supreme Court on said first appeal; that in the premises said Hamilton Circuit Court in the retrial of said cause did deny to these plaintiffs the equal protection of the law and did take their property without due process of law in contraven-

tion of the Fourteenth Amendment of the Constitution of the United States; that forasmuch as said Supreme Court on said second appeal affirmed said second judgment of said Hamilton Circuit Court said Supreme Court thereby did deny to these plaintiffs the equal protection of the law and did take their property without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States.

[fol. 141] B. Upon the retrial of said cause said Hamilton Circuit Court arbitrarily and capriciously disregarded the mandate of said Supreme Court and opened the issues of said cause as of date June 27, 1917, when there was filed in said cause "the second amended counter claim of the Fidelity Trust Company in its corporate capacity proper and as trustee;" that by overleaping and disregarding the many years which elapsed since the 30th day of October, 1912, when this action was begun said Hamilton Circuit Court arbitrarily and capriciously cast aside and refused to consider all the wrongs done to said trust estate prior to the bringing of this action and prior to the filing of said second amended counter claim on June 27, 1917; that upon and by its said action in thus dating the right of action in this cause from June 27, 1917, said Hamilton Circuit Court arbitrarily and capriciously cast aside and disregarded the plaintiffs' complaint in said cause and cast aside and disregarded all of the many grievous wrongs of nonfeasance and malfeasance done by said Trust Company to said trust estate and to these plaintiffs prior to October 30, 1912 and from October 30, 1912, to June 27, 1917, and thereby said Hamilton Circuit Court denied to these plaintiffs the equal protection of the law and took the property of these petitioners without due process of law all in contravention of the Fourteenth Amendment of the Constitution of the United States. And forasmuch as the said wrongful action of said Hamilton Circuit Court was upon the sole authority of said Amended Act of March 5, 1915, [fol. 142] said act impairs the obligation of said trust contract, and the two concurrent deeds in contravention of Article I, Section 10 of the Constitution of the United States.

C. Upon the retrial of said cause said Hamilton Circuit Court arbitrarily and capriciously disregarded its own jurisdiction under the first mandate of said Supreme Court and thereupon assumed to hear and determine issues as to the interpretation and construction of said trust agreement and the trust deeds executed concurrently therewith; that in said interpretation and construction of said trust agreement and concurrent deeds said Circuit Court in contravention of the opinion and mandate of said Supreme Court, pursuant of which said Circuit Court then and there had only a limited and defined jurisdiction, said Circuit Court adjudged and determined that said trust agreement and concurrent deeds did not constitute a contract controlled with the law of trusts but on the contrary that said trust agreement and concurrent deeds constituted a contract of outright and unqualified sale of the fee simple title of said real estate by these plaintiffs to said Trust Company and that these plaintiffs thereby had parted with all their right, title and interest in and to said real estate and that their sole interest in the premises, if any,

was inchoate and such only as might hereafter vest in the contingency that said Trust Company should sell said real estate at such price as would leave an unclaimed surplus after an order of distribution devised and ordered by said court; that the determination of said issues as to the interpretation and construction of said [fol. 143] trust agreement and concurrent deeds was wholly beyond the jurisdiction of said Circuit Court under said mandate and was *coram non judice* and void; and the action thereafter of said Supreme Court in attempting to make valid said void judgment of said Circuit Court was itself void; that thereby said Circuit Court and said Supreme Court denied to these plaintiffs the equal protection of the law and took the property of these plaintiffs without due process of law, all in contravention of the Fourteenth Amendment of the Constitution of the United States.

D. Upon the retrial of said cause said Hamilton Circuit Court arbitrarily and capriciously disregarded its own record, without any impeachment thereof, and so disregarding its own record failed and refused to accord any potency or credit whatsoever to (1) the record and proceedings on the Sheriff's sale of the Marion County lands of the trust estate pursuant of the first judgment of said Circuit Court; to (2) the record and proceedings on the Sheriff's sale of the Hamilton County lands of the trust estate pursuant of the first judgment of said Circuit Court and further disregarding its own jurisdiction and the issues before it adjudged and determined the reformation of said trust agreement and concurrent deeds to the effect of changing them from a contract controlled with the law of trusts into a contract of absolute and unconditional sale by these plaintiffs and of purchase by said Trust Company leaving to these plaintiffs no right or interest whatsoever in said trust estate or in said action; that said action of said Circuit Court and said determination of the reformation of said trust contract [fol. 144] tract were matters *coram non judice* said Circuit Court and said judgment was void; that the action thereafter of said Supreme Court in attempting to make valid said void judgment of said Circuit Court was itself void; that thereby said Circuit Court and said Supreme Court denied to these plaintiffs the equal protection of the law and took their property without due process of law, all in contravention of the Fourteenth Amendment of the Constitution of the United States.

E. Upon the retrial of said cause said Hamilton Circuit Court arbitrarily and capriciously disregarded the said mandate of the Supreme Court and likewise disregarded the complaint of these plaintiffs and the evidence in support thereof and thereupon accepted and adopted as true and controlling the statements in said second amended counter claim as supplemented viz: that these plaintiffs were wholly without any interest whatsoever in said trust estate, and that they were incompetent upon their complaint to bring said trust estate into court; that further proceeding, arbitrarily and capriciously in said cause said Circuit Court rendered judgment sustaining said second amended counter claim as supplemented and thereupon awarded judgment against said trust estate in favor of said

Fidelity Trust Company in the sum of Fifty Thousand Six Hundred and Ninety-Seven Dollars (\$50,697.00) and ordered the sale of said real estate without the benefit of valuation or appraisement laws of the State of Indiana to pay said judgment; that upon the face of the record, towit, said second amended counter claim as sup- [fol. 145] plemented and said judgment, said trust estate was not before the court, for that upon the averments of said counter claim these plaintiffs were incompetent to bring said trust estate before the court and said Trust Company was at its own suit against trust estate, incompetent to defend said trust estate; that in the premises the matter of the claim of said Trust Company against said trust estate was a case prosecuted to judgment without an adversary, that said trust estate did not have its day in court in the premises, that the matter of said claim against said trust estate was coram non iudice and said judgment of said Circuit Court is void; that in affirming said judgment of said Circuit Court said Supreme Court denied to these plaintiffs the equal protection of the law and took their property without due process of law, all in contravention of the Fourteenth Amendment of the Constitution of the United States.

59. And plaintiffs say and would show unto the court that said second opinion and judgment of the Supreme Court of Indiana is void because of the participation therein of Judge Louis B. Ewbank, a member of said Court who was incompetent and disqualified to sit because of interest as appears upon the facts in the premises, towit: There was pleaded in said second amended counter claim and there was used in evidence on the trial of said cause over the objections of these plaintiffs a memorandum of the judgment of the Marion Circuit Court of Indiana in Cause No. 25260; that in said Cause 25260 these plaintiffs were plaintiffs and George V. Coffin, as Sheriff of Marion County, in the State of Indiana and the Fidelity Trust Company in its corporate capacity proper were defendants; that [fol. 146] said suit was to the effect that certain unlawful liens and incumbrances had been placed on certain Marion County lands of these plaintiffs by means of pretended sheriff's sales thereof; that said Marion County lands are the identical Marion County lands described in the deed of trust herein as being the Marion County lands of these plaintiffs conveyed to said trustee; that said sheriff's sales were made upon a certified copy of the judgment and decree of said Hamilton Circuit Court, which judgment and decree was thereafter set aside and vacated by the Supreme Court of Indiana on the 5th day of October, 1915 (185 Ind. 172); that in said suit these plaintiffs further seeking to preserve said trust estate for the uses stated in said trust agreement and said deed of trust sued to have said Marion County lands cleared of the cloud placed thereon by said sale; that said action was begun by these plaintiffs, filing their complaint in the Office of the Clerk of said Marion Circuit Court and causing summons to issue thereon for the defendants named; that said complaint was filed on towit, the 26th day of May, 1915; that Charles E. Cox, Esq., at present one of the

attorneys in this cause of said Fidelity Trust Company was a Judge of the Supreme Court of Indiana, at the time said opinion and judgment of said Court was rendered on the 5th day of October, 1916, reversing said judgment and decree of said Hamilton Circuit Court, and apparently he participated in the rendition of said judgment of said Court and concurred therein; that when he retired from membership in said Court said Cox appeared as attorney and counsel for defendant the Fidelity Trust Company in the matters in contro-[fol. 147] versy in this suit affecting this trust and he with another, filed in said Cause 25260 in said Marion Circuit Court the cross-complaint of said Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as trustee of the estate of Dora E. Rooker, and caused summons to be issued on said cross-complaint for said Dora E. Rooker and William V. Rooker; that said cross-complaint was on the theory that said cross-complainants had been continuous and faithful in the performance of their duties in the administration of said trust and that they had faithfully performed said duties; that said Dora E. Rooker and William V. Rooker had by their said trust deed conveyed all their interest in said trust estate; that said Dora E. Rooker and William V. Rooker were wrongfully and unlawfully meddling with said property and were interfering with and preventing said defendants from performing the duties required in the administration of said trust; that said Dora E. Rooker and William V. Rooker should be adjudged to have no interest in said trust property and that they should be restrained and enjoined from asserting any interest therein; that said Ewbank, as said Judge of said Marion Circuit Court found against these plaintiffs as plaintiffs in said cause, and he sustained said cross-complaint on the trial of said cause and rendered judgment accordingly, including that these plaintiffs there present as plaintiffs in said complaint and as defendants in said cross-complaint had no interest in said trust property, and that they should be restrained and enjoined from asserting any interest therein; that said judgment was given and rendered by said Ewbank on the 5th day of February, 1918, and he fixed the penalty of the appeal bond [fol. 148] therein at Five Thousand Dollars (\$5,000.00), which these plaintiffs were unable to give because the legal title to their property was in the hands of said trustee; that on the 29th day of May, 1918, these plaintiffs, as said plaintiffs, filed in the Office of the Clerk of said Supreme Court their certified copy of the record proceedings and judgment of said Marion Circuit Court in said Cause No. 25260, together with assignments of error thereon, and caused notice to be issued thereon; that said cause was docketed in said Supreme Court as Cause No. 23477, but was afterwards transferred to the docket of the Appellate Court of Indiana as Cause No. 10444, where the same is pending; questions at issue in said Cause No. 25260 and determined by said Ewbank and carried into the record of said Cause in said Hamilton Circuit Court upon the said second amended counter claim as supplemented and the proof thereof embody issues involved in this complaint, all to the effect

that said Ewbank in sitting as a judge in said cause in said Supreme Court passed upon his own errors while sitting as a judge in said Cause No. 25260 in said Marion Circuit Court; that said action of said Ewbank in sitting in the determination of said Supreme Court in said cause was beyond the precedents and traditions of said court; that plaintiffs knew that said Ewbank sat with the other members of said court at the oral argument of said cause, but plaintiffs then believed, as they lawfully might do, that he came upon the bench without information as to the nature and issues of said cause and that he would recuse himself and not participate further when [fol. 149] he became informed; but plaintiffs say that the memorandum of the opinion of said Supreme Court filed in the Office of its Clerk in said cause, contains no notation that said Ewbank did not sit and that the text of the said opinion as published in the advance sheets of the Northeastern Reporter does not disclose that said Ewbank did not sit; that it is a custom and usage, and may be said to be a rule of said court, to note on the memorandum of opinion and judgment where a judge does not participate in the decision of a cause, and, knowing these things and upon the information then impart, and believing them to be true, plaintiffs say that Judge Ewbank sat in the determination of said cause in said Supreme Court while he was incompetent and disqualified to sit. That in and by the law of Indiana these plaintiffs as said appellants were as a matter of right entitled to have their appeal to the Supreme Court of Indiana determined by an impartial tribunal and one without bias, prejudice or interest in behalf — their own opinion, as the same was to be rendered upon said Cause; that each and all — these rights in the premises of these plaintiffs were wrongfully and unlawfully disregarded, denied and destroyed by said Supreme Court with said Ewbank sitting therein; that because of the premises the said second opinion and judgment of said Supreme Court is void and therefore said opinion and judgment denies to these plaintiffs the equal protection of the law and it takes the property of these plaintiffs without due process of law, all in contravention of the Fourteenth Amendment of the Constitution of the United States.

[fol. 150] 60. And plaintiffs say and would show unto the court as to the further interest of Judge Louis B. Ewbank in the matter and things involved in said Cause, and in said Cause in said Marion Circuit Court, and in said Cause in said Hamilton Circuit Court, and in said Cause in said Supreme Court of Indiana on said second appeal, and in the precedents to be established thereby in the law of Indiana to the benefit and advantage of trustees; that in and by the last will and testament of one Volney T. Malott, late of said Marion County, the said Louis B. Ewbank was nominated and appointed executor and co-trustee of the estate of said Malott, valued at many millions of dollars, and embracing holdings of stock in banks and trust companies, competent under the law to accept and execute trusts of the kind and character of the trust involved in this case; that among said holdings of stock in banks and trust companies said Ewbank and his co-executors and co-trustees are First Nation

Bank, Brazil, Indiana, stock valued at Thirty Thousand Dollars (\$30,000.00); Indiana National Bank, Indianapolis, Indiana, stock valued at Six Hundred Sixty-two Thousand and Five Hundred Dollars (\$662,500.00); Union Trust Company, Indianapolis, Indiana, stock valued at Sixty-five Thousand Dollars (\$65,000.00); that it would be greatly beneficial to a trustee and to said banks and trust companies and it would enhance the value of the stock of said banks and trust companies to have the law established as being that trustees were not liable for the maladministration of their trusts nor for the waste and conversion by them of their trust estate, and that a trustee [fol. 151] could not be held to respond to the complaint of a cestui que trust that the trustee was guilty of maladministration of a trust and waste and conversion of the trust estate, and that there was no party in interest competent to invoke the jurisdiction of a court to command a trustee to fidelity in the administration of a trust, nor to invoke the jurisdiction of a court to determine that a trust agreement, of the nature and kind affected by this suit, could be adjudged to have been repudiated by the trustee and thereupon reminded by the parties aggrieved, nor to invoke the jurisdiction of a court to remove a trustee who was at fault and to sequester the trust estate by the appointment of a receiver therefor to the end that the trust estate could be administered for the benefit of all the parties in interest and not solely for the benefit of the trustee; that said Volney T. Malott departed this life June 14, 1921, at said Marion County; that at the time of his death he was more than eighty (80) years of age; that on the 8th day of March, 1916, said Malott, knowing his advanced years and comprehending the near approach of his death in the usual processes of nature, executed his said will, wherein he nominated the said Louis B. Ewbank, together with Thomas H. Kaylor and John Malott Fletcher, co-executors of his said will, with the right of survivorship and in and by said will he appointed said Ewbank, Kaylor and Fletcher co-trustees of his estate, with the right of survivorship, said trusteeship to become effective when the statutory period had expired for the administration of said estate and the final settlement thereof, usually a minimum of [fol. 152] thirteen (13) months after the issuance of letters, and said trusteeship was thereafter to continue in said Ewbank, Kaylor and Fletcher, and in the survivor of them, until the second day of March, 1944, an approximate period of twenty-three (23) years, when said trust was to be closed and the proceeds thereof distributed as provided in said will, said trustees to take credit for their charge, including certain annual charges payable out of the income of said estate; that said Kaylor and Fletcher are bank clerks and said Ewbank is the only lawyer among said co-executors and said co-trustees; that these plaintiffs are informed and believe, and upon information and belief state the fact to be, that said Ewbank knew of his appointment as said executor and trustee and of the interests, duties, rights, powers, opportunities and all the circumstances thereof, when the same was made, and that he had such knowledge on the 5th day of February, 1918, when as Circuit Judge he heard and determined said Cause

No. 25260 in said Marion Circuit Court; that these plaintiffs did not have, nor did either of them have, any knowledge whatsoever as to the said will of said Malott nor as to any provision thereof, nor as to the appointment of said Ewbank as such co-executor and co-trustee until after said will was probated in the Probate Court of said Marion County on the 20th day of June, 1921, when the provisions of said will were set forth in the daily newspapers and those publications imparted to these plaintiffs, and to each of them, the first information and the first means of information, they, and each of them, had as to [fol. 153] said last will and testament and as to any of its provisions, and that said Ewbank had any of the interests, duties, rights, powers, opportunities and purposes which he now has, holds, entertains and enjoys; that upon the probate of said last will and testament said Ewbank duly accepted said trust and qualified and continuously thereafter performed the duties of such co-executor of said will, and thereafter he duly qualified as co-trustee of said estate, valued at many millions of dollars, under said will, and he now holds said office of co-trustee and he intends to hold said office until the end of the term thereof; that prior to the decision of this cause by the Supreme Court of Indiana, it always had been the law of this State that the maxim prevailed, *nemo debet esse iudex in propria sua causa*—no one ought to be a judge in his own cause—and that judicial proceedings were void where the judge who made the ruling had an interest which might affect him in the performance of his duty in the premises; that upon the premises the said judgment of said Marion Circuit Court in said Cause No. 25260 was unlawful and void and its use in evidence on the trial of said cause in said Hamilton Circuit Court was unlawful and the participation of said Ewbank in the consideration of said cause in said Supreme Court was unlawful and rendered said judgment void and denied to these plaintiffs and to each of them due process of law and the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

[fol. 154] 61. And plaintiffs say and would show unto the court that since the rendition of said second judgment of said Hamilton Circuit Court the defendant Fidelity Trust Company acting solely upon the pretended authority of said judgment has taken possession of the lands of said trust estate and has appropriated and converted to its own use the rents, issues and profits thereof and is committing waste thereon in cutting young and growing timber, in failing and refusing to maintain and keep in repair buildings, fences and other structures, in pasturing fallow lands in wet seasons, in pasturing alfalfa and timothy meadows, in breaking up and destroying alfalfa and other grass growing lands; in failing, neglecting and refusing to manure and fertilize said lands, in failing, neglecting and refusing to reseed alfalfa lands; in failing, neglecting and refusing to cut alfalfa meadows, to the effect that the same produce seed and thereupon perish; in selling the soil of said lands to contractors and others who are strangers to this controversy; that the said Triangle Realty Company and Thomas West respectively claiming by, under and through said Fidelity Trust Company are in the actual physical

possession of said lands and are claiming to have an interest therein adverse to the rights of these plaintiffs; that the said claims of said Triangle Realty Company and Thomas West are wrongful and unlawful and are a cloud upon the title to said real estate and upon the title of the plaintiffs therein; that said Triangle Realty Company and Thomas West are made parties hereto in order that they be [fol. 155] required to set up any, each and every interest they may have respectively in said real estate and in any part thereof and that such claim may be adjudged to be unlawful and without right and adverse to and a cloud upon the right, title and interest of these plaintiffs in said real estate and that such cloud may be removed by the judgment and decree of this court.

62. And these plaintiffs further say and show unto the court that they have done no wrong to any of the defendants or to said trust estate, but in good faith they have many years devoted their time, services and labor to the preservation and upbuilding of said trust estate and the property thereto belonging; they admit that they have with their proper appeal to the courts sought to prevent the wrongful and unlawful appropriation and conversion of the property of said trust estate by said Fidelity Trust Company and its co-defendants herein, but all these efforts these plaintiffs had a right to make and each of them was made in a lawful and proper manner; that the reasonable worth and value of plaintiffs' costs and expenses, including fees of attorneys, solicitors and counsel is Five Thousand Dollars (\$5,000.00) per annum for each year of the eleven (11) years since the service on plaintiffs by the defendant Fidelity Trust Company on October 28, 1912, of said written notice of repudiation of said trust and renunciation of said office of trustee; that the damages to said trust property arising out of waste committed by said defendants is of the reasonable value of Ten Thousand Dollars (\$10,000.00); [fol. 156] that the loss of crops and of the proper earnings of said real estate, and of the rents, issues and profits thereof to these plaintiffs, due solely to the said misfeasance and malfeasance of said Fidelity Trust Company has damaged these plaintiffs Twenty-five Thousand Dollars (\$25,000.00); that in equity and good conscience these plaintiffs are not indebted in any sum to said Trust Company defendant but said Trust Company is largely indebted to these plaintiffs.

63. And these plaintiffs say and would show unto the court that there remain no further and outstanding liens, claims or demands whatsoever enforceable against said trust in the hands of any person not a party to this suit but that each and every lien, claim or demand whatsoever which may be found to exist against said trust is represented in and by the persons now before the court and the court can herein do, complete and final justice.

Wherefore, plaintiffs pray the judgment and decree of this court; and that the said judgment of said Marion Circuit Court, and the said second judgment of said Hamilton Circuit Court, and the said second judgment of said Supreme Court of Indiana be adjudged to be null and void and of no effect whatsoever and that the said first judgment of said Supreme Court of Indiana be enforced and that an accounting be had herein to the purpose and end that these plaintiffs

may show to the court that in equity and right said defendants, and each of them, are wholly without any right or title to or interest in or lien upon said trust estate or the real estate thereto belonging; and will the court adjudge and decree that in and by said written [fol. 157] notice of repudiation of said trust and renunciation of the office of trustee, served on these plaintiffs on October 28, 1912, by said Fidelity Trust Company in its corporate capacity proper and by said Fidelity Trust Company as trustee, and in and by the acts and things done by said Trust Company and said trustee thereafter and upon said notice, that said Trust Company and said trustee finally and forever relinquished and released all their right, title and interest in and to said trust estate, and the real estate thereto belonging except as the court may find that the same should be held for the payment of any sum which the court may find to be due to said Trust Company as trustee on said accounting; and if the court should find that there remains any sum owing to said Trust Company as trustee on said accounting them will the court appoint a time in which such indebtedness shall be paid; and subject only to such possible right of recourse to said property for the payment of such judgment as the court may render, although these plaintiffs believe that the court will not adjudge such right to recourse, will the court adjudge and decree that the title of these plaintiffs in and to said real estate be forever quieted and that neither of said defendants has any further interest therein nor to the possession, use, rents, issues and profits thereof. And will the court issue its temporary restraining order herein restraining and enjoining the execution of said judgment of said Marion Circuit Court in said Cause No. 25260 and, also, said second judgment of said Hamilton Circuit Court in said Cause [fol. 158] No. 16338 and enjoining the continuance of the status created under each of said judgments, and continue said restraining order until the hearing of this cause and upon said hearing will the court continue said restraining order as a temporary injunction until the trial of this cause and upon said trial will the court continue said temporary injunction as a permanent injunction. And the plaintiffs pray for all such other and further relief in the premises as to the court may seem proper and equitable and just. And all this plaintiffs forever pray.

(Signed William V. Rooker, Solicitor for Plaintiffs. (Signed) Floyd Y. Christian, Per R.; (Signed) Ralph H. Walts, Per R., Of Counsel.

Dora E. Rooker and William V. Rooker being first duly sworn upon their oaths say that they are the plaintiffs in the foregoing complaint and that said complaint, in substance and in fact, is true. And further affiants saith not.

(Signed Dora E. Rooker. (Signed) William V. Rooker.

Subscribed in my presence and sworn to before me this 17th day of March, 1923. Witness my hand and official seal. (Signed) William P. Kappes, Clerk District Court of the United States for the District of Indiana. [Seal of U. S. Dist. Court, Dist. of Ind.]

[fol. 159] And thereupon there issued out of the office of the Clerk of the said Court a subpoena in the above entitled cause together with the return of the Marshal endorsed thereon:

[fol. 160] SUBPOENA AND RETURN

UNITED STATES OF AMERICA,
District of Indiana: m

The President of the United States of America to the Marshal of the District of Indiana, Greeting:

You are hereby commanded to summon Fidelity Trust Company, Indianapolis, Triangle Realty Company, Indianapolis, Thomas West, Noblesville, if they be found in your district, to be and appear in the District Court of the United States, for the District of Indiana, afore-said, at Indianapolis, on the 6th day of April next, to answer a certain Bill in Equity filed and exhibited in said Court against them by Dora E. Rooker, William V. Rooker. Hereof they are not to fail under the penalty of the law thence ensuing.

And have you then and there this writ.

Witness, the Honorable Albert B. Anderson, Judge of said Court, and the seal thereof, this 17 day of March, A. D. 1923.

William P. Kappes, Clerk. [Seal.]

Memorandum

The said defendant- are required to file his answer or other defense in this suit in the Clerk's Office of said Court on or before the twentieth day after service, excluding the day thereof; otherwise the said Bill may be taken pro confesso.

William P. Kappes, Clerk.

[fol. 161] DISTRICT OF INDIANA:

I received this writ at Indianapolis, in said District, at — o'clock — M., on the 17th day of March, A. D. 1923, and served the same in Marion & Hamilton County, as follows:

17, 19 day of March, 1923, by copy upon the within named Fidelity Trust Company, personally and by copy upon W. M. Fogarty, president of said company, and upon Triangle Realty Co. personally and by copy upon Dr. J. D. Moschelle, president of said company, at Indianapolis, Marion County, Indiana, March 17, 1923; and upon Thomas West, personally and by copy, at 2 miles south of Noblesville, Hamilton County, Indiana, March 19, 1923.

L. P. Meredith, U. S. Marshal, By Wm. E. Garrabrant, Deputy.

Marshal's costs:

3 services	\$6.00
Expense	1.75
	<hr/> \$7.75

[fol. 162] And afterwards to wit, at the November Term of said Court on the 27th day of March, before the Honorable Albert B. Anderson, Judge of said Court, the following proceedings were had in the above entitled cause;

Come now the defendants in the above entitled cause by their solicitors, and said defendants file motion to dismiss bill of complaint, which motion to dismiss is in the words an figures following, to wit:

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS

Come now the defendants in the above entitled and numbered cause and separately and severally move to dismiss the same and that they take their costs in this suit incurred, on and for the grounds following:

1. The bill of complaint shows on its face by its averments, statements and recitals that this court has no jurisdiction of the subject matter of this suit in this, that it appears from said bill that the suit is between citizens of the State of Indiana and that no question is substantially or really involved therein arising under the Constitution or laws of the United States, or treaties made under their authority.

2. The averments of the bill of complaint do not contain facts sufficient in equity to enter the relief and decree therein prayed or any part thereof against these defendants or either of them.

Charles E. Cox, Henry Seyfried, Attorneys for Defendants

[fol. 163] And afterwards, towit, at the November Term of said Court, on the 9th day of April, 1923, before the Honorable Albert B. Anderson, Judge of said Court, the following further proceedings in the above entitled cause were had, towit:

IN UNITED STATES DISTRICT COURT

ORDER DISMISSING BILL OF COMPLAINT

Come now the parties by their solicitors, and the defendant's motion to dismiss bill of complaint is submitted to the court, and the court being sufficiently advised, and it appearing that this court is without jurisdiction, herein the said motion of the defendants is

ordered sustained. It is therefore ordered, and adjudged by the court that this cause be and the same is now hereby dismissed for want of jurisdiction at the cost of the complainants, taxed at \$—.

[fol. 164] And afterwards towit, at the November Term of said Court, on the 12th day of April, before the Honorable Albert B. Anderson, Judge of said Court, the following further proceedings in the above entitled cause were had, towit:

Come now the complainants by their solicitor William V. Rooker, and file their petition for appeal and assignment of errors, which are respectively in the words and figures following, towit:

[fol. 165] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF INDIANA

In Equity. No. 665

[Title omitted]

PETITION FOR AND ORDER ALLOWING APPEAL

The above named plaintiffs, Dora E. Rooker and William V. Rooker, conceiving themselves aggrieved by the order and decree entered on the ninth (9th) day of April, 1923, dismissing the bill of complaint, in the above entitled proceeding, do hereby appeal from said order and decree to the Supreme Court of the United States and they pray that this their appeal may be allowed; and that the penalty, terms and conditions of their appeal bond may be determined, and that a transcript of the record and proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

(Signed) William Veepeau Rooker, Attorney for Plaintiffs
and Appellants, Dora E. Rooker and William V. Rooker,
Board of Trade Building, Indianapolis, Ind. Indianapolis,
Indiana, April 10, 1923.

[fol. 166] And now, towit: On April 12, 1923, it is ordered that the appeal be allowed as prayed for.

Albert B. Anderson, District Judge.

[fol. 167] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF INDIANA

In Equity. No. 665

[Title omitted]

ASSIGNMENT OF ERRORS

Dora E. Rooker and William V. Rooker, appellants in the cause above entitled, make and file this their assignment of errors upon which they will rely in the prosecution of their appeal to the Supreme Court of the United States in said cause from the order and decree made by this Honorable Court on the ninth (9th) day of April, 1923, that is to say:

(1)

That the District Court of the United States for the District of Indiana erred in dismissing the bill of complaint in said above entitled cause, for want of jurisdiction of the subject matter of said suit, stated in said bill.

[fol. 168]

(2)

That the District Court of the United States for the District of Indiana erred in its order of April ninth (9th), 1923, sustaining the motion of the respondents filed March twenty-seventh (27th), 1923, to dismiss the bill of complaint in said cause.

Wherefore, the appellants pray judgment that said Decree of said District Court be reversed and that said District Court for the District of Indiana be ordered to take jurisdiction of said cause and to proceed with the formation of issues and with the trial of said cause and that justice may be done.

(Signed) William Velpeau Rooker, Attorney for Appellants

[fols. 169 & 170] And thereupon it is ordered that the prayer of said petition for appeal be, and the same is hereby allowed upon the filing of an appeal bond in the sum of One Thousand Dollars (\$1,000.00), with good and sufficient surety thereon, to be approved by the Court.

And the complainants now file their appeal bond in the sum of One Thousand Dollars (\$1,000.00) with the New Amsterdam Casualty Company as surety thereon, which bond is approved by the Court and is in the words and figures following, to wit:

[Omitted in printing.]

[fol. 171] And afterwards, to wit, at the November Term of said Court, on the 14th day of April, 1923, before the Honorable Albion B. Anderson, Judge of said Court, the following further proceedings in the above entitled cause were had, to wit:

IN UNITED STATES DISTRICT COURT

CITATION AND SERVICE

Come now the complainants, by their solicitor, and file citation on appeal, together with the marshal's return endorsed thereon, which citation with the marshal's return endorsed, are in the words and figures following, towit:

To Fidelity Trust Company, Triangle Realty Company, Thomas West, respondents in the cause above entitled:

You are each hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington, in the District of Columbia, on the 10th day of May, 1923, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the District of Indiana, wherein Dora E. Rooker and William V. Rooker are appellants and Fidelity Trust Company, Triangle Realty Company and Thomas West are respondents, to show cause, if any there be, why the decree and order in said appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable William Howard Taft, Chief Justice of the United States this twelfth (12th) day of April, 1922.

Albert B. Anderson, District Judge.

Received copy of the foregoing citation this — day of April, 1923.
— — —, Attorney for Respondents.

[fol. 172] Received this writ at Indianapolis, Indiana, April 12, 1923, and served the same upon the Fidelity Trust Company, by reading the same to and within the hearing of, and by delivering a true copy of this writ, together with copy of Præcipe for Transcript, to James McNulty, Vice President of said company at Indianapolis, he being the highest officer of said company found in my district; and upon the within named Triangle Realty Company, by leaving a true copy of this writ, together with copy of Precipe for Transcript at the last and usual place of residence of Dr. J. D. Moschelle, president of said company, at Indianapolis, Marion County, Indiana; and upon Thomas West, by reading the same to and within his hearing, and by delivering a true copy of this writ, with copy of Precipe for Transcript, to him at Noblesville, Hamilton County, Indiana, April 12, 1923.

L. P. Meredith, U. S. Marshal, By Wm. E. Garrabrant, Deputy.

Marshal's costs:

Services of Citation.....	\$6.00
serv. of Præcipe.....	6.00
Expense	3.62
	<hr/>
	\$15.62

[fol. 173] And on the same date, the following further proceedings were had in the above entitled cause, to wit:

And said complainants, by their solicitor, also file præcipe for transcript for use on appeal to the Supreme Court of the United States, which præcipe is in the words and figures follows:

[fol. 174] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF INDIANA

In Equity. No. 665

[Title omitted]

PRÆCIPE FOR TRANSCRIPT

To the Hon. William P. Kappes, clerk of the District Court of the United States for the District of Indiana:

You will please make out and certify over your hand and the seal of said court the following portions of the record in the cause above entitled, for the purposes of an appeal to the Supreme Court of the United States, namely:

- (1). The bill of complaint.
- (2). The writs of subpoena and the marshal's returns thereto.
- (3). The motion to dismiss the bill of complaint, omitting memorandum thereto attached.
- (4). The order and decree of the court of April 9, 1923.
- (5). The Prayer for appeal and allowance thereof.
- (6). The assignment of errors.
- [fol. 175] (7). The certificate of Federal Question. (Not on file.)
- (8). The Bond on Appeal. (Cost Bond.)
- (9). The Supersedeas order. (Not made.)
- (10). The Citation on appeal and proof of service thereof.
- (11). The Præcipe for transcript and proof of service thereof.
- (12). Each of the foregoing papers should be accompanied with all the proper entries of filing thereof, and orders pertaining thereto.

And upon the making of said transcript you will attach your certificate as provided by law over your hand and the seal of said Court.

(Signed) William Velpeau Rooker, Attorney for Appellants

Received copy of the foregoing præcipe this day of April, 1923.
_____, Attorney for Respondents.

CO. 2

27

CO. 3

SB 212

[fol. 176]

CLERK'S CERTIFICATE

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT
OF INDIANA

I, William P. Kappes, Clerk of the District Court of the United States, for the District of Indiana, do hereby certify that the above and foregoing is a full, true, and complete copy of *of* such portions of the record in the cause Dora E. Rooker and William V. Rooker vs. Fidelity Trust Company, Triangle Realty Company and Thomas West No. 665 Equity in the District Court of the United States for the District of Indiana, as are ordered by the appellants in their præcipe for transcript hereinbefore set out, except that there is not on file in said cause item No. 7 "The certificate of Federal question," Item No. 8, "The Supersedeas Bond on Appeal" and Item No. 9 "The Supersedeas Order" referred to and included in said Præcipe, as the same appears of record in my office.

Witness my hand and the seal of said Court, at Indianapolis, in said District, this 14th day of April, 1923.

Wm. P. Kappes, Clerk. [Seal of District Court of the United States, District of Indiana.]

April 14, 1923.

Rec'd of Wm. V. Rooker \$27.00 for payment of costs for this transcript.

William P. Kappes, Clerk.

Endorsed on cover: File No. 29,550. Indiana D. C. U. S. Term No. 295. Dora E. Rooker and William V. Rooker, appellants, vs. Fidelity Trust Company, Triangle Realty Company, and Thomas West. Filed April 16th, 1923. File No. 29,550.

(9456)

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SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1923

No. 295

**DORA E. ROOKER AND WILLIAM V. ROOKER
APPELLANTS,**

vs.

**FIDELITY TRUST COMPANY, TRIANGLE REALTY
COMPANY, AND THOMAS WEST**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF INDIANA**

STATEMENT OF THE CASE

Suit by appellants as settlors of a conventional trust in real estate for an accounting and to redeem the trust estate upon payment of its debts, and, thereupon, to quiet title to the property of the trust estate as against the trustee and certain persons claiming under the trustee.

The case got into the Federal Court on the grounds (1) that a specified act of the general assembly of Indiana impaired the obligation of the trust agreement at issue and (2) on the ground that certain judgments of the Courts of Indiana were void and took the property of appellants without due process of law and in denial of the equal protection of the law.

In the Court below the respondents moved to dismiss the cause on the grounds (1) that "this Court has no jurisdiction of the subject matter of this suit in this, that it appears from said bill that the suit is between citizens of the State of Indiana

and that no question is substantially or really involved therein arising under the Constitution or laws of the United States, or treaties made under their authority; (2) that the averments of the bill do not contain facts sufficient in equity to enter the relief and decree therein prayed or any part thereof against these defendants or either of them."

Tr. Page 80

The Court sustained the motion to dismiss on jurisdictional grounds and rendered final judgment to the effect following:—"Come now the parties by their solicitors and the defendants motion to dismiss the bill of Complaint is submitted to the Court, and the Court being sufficiently advised and it appearing that this Court is without jurisdiction herein, the said motion of the defendants is ordered sustained. It is therefore ordered, and adjudged by the Court that this Cause be and the same is now hereby dismissed for want of jurisdiction at the cost of the Complainants taxed at \$....."

Tr. Page 80

There was a petition and order for appeal to this Court.

Tr. Page 81

There was an assignment of errors which included:

"1. That the District Court of the United States for the District of Indiana erred in dismissing the bill of Complaint in said above entitled Cause, for want of jurisdiction of the subject matter of said suit stated in said bill.

"2. That the District Court of the United States erred in its order of April ninth (9), 1923, sustaining the motion of respondents, filed March twenty-seventh (27), 1923 to dismiss the bill of Complaint in said Cause.

"Wherefore, the appellants pray judgment that said decree of said District Court be reversed and that said District Court for the District of Indiana be ordered to take jurisdiction of said Cause and to proceed with the formation of issues and with the trial of said Cause and that justice may be done."

Tr. Page 82

The bond on appeal was fixed at the penal sum of one thousand dollars with the New Amsterdam Casualty Company as surety thereon which bond was approved and given.

Tr. Page 82

Citation was issued and served by the Marshal, and return made.

Tr. Page 83

A copy of the praecipe for transcript of the record was issued, served by the Marshal and return made.

Tr. Page 84

The clerk's certificate was made and appended.

Tr. Page 85

STATEMENT OF THE BILL OF COMPLAINT.

The bill of Complaint which was duly verified by both appellants, and subscribed by the solicitors contained the following averments:

"To the Honorable Albert B. Anderson, Judge of the District Court of the United States for the District of Indiana:

"Dora E. Rooker and William V. Rooker file this their Bill of Complaint against the Fidelity Trust Company, the Triangle Realty Company and Thomas West, and thereupon your orators complain and say:

"That on, to-wit, the eleventh (11) day of October, 1909, and long prior thereto, the said William V. Rooker and Dora E. Rooker were husband and wife. [Printed Transcript page 1).

2. That said Fidelity Trust Company is a corporation organized and operating in the State of Indiana pursuant of an Act of the [fol. 3] General Assembly of said State entitled, "An Act to authorize the organization and incorporation of loan and trust and safe deposit companies, and defining their powers, rights and duties and other matters connected therewith," approved March 4, 1893, and acts amendatory thereof and supplemental thereto. (Burns R. S. 1914, Secs. 4942-4962c).

3. That said Triangle Realty Company is a corporation organized and operating in the State of Indiana pursuant of an Act of the General Assembly of said State entitled "An Act concerning the organization and perpetuity of voluntary associations, repealing all laws in conflict therewith, legalizing the organization of certain associations organized under former laws, and declaring an emergency," approval March 9, 1901,

and acts amendatory thereof and supplemental thereto. (2 Burns R. S. 1914, Secs. 4286-4330). And Thomas West is a resident of Hamilton County Indiana.

4. That in behalf of said defendants the State of Indiana, with the enactment of a certain statute and with certain judicial proceedings, has attempted, in contravention of Article I, Section 10 of the Constitution of the United States, to impair and has impaired and threatens to continue to impair the obligation of a certain contract called "the trust agreement" made and entered into by and between these plaintiffs and said Fidelity Trust Company, which contract is hereinafter more fully stated and described; that to protect the obligation of said contract against such impairment and [fol. 4] threatened impairment this suit is begun and these plaintiffs here now claim the protection of said section of said article of said Constitution.

5. That in behalf of said defendants the State of Indiana, with certain pretended judicial proceedings has attempted in contravention of the Fourteenth Amendment of the Constitution of the United States, to take and it has taken and it threatens to continue the taking of the property of these plaintiffs without due process of law and in denial to these plaintiffs of the equal protection of the law and these plaintiffs here now claim the protection of said Amendment of said Constitution in behalf of their property and their rights.

6. That on, to-wit, the eleventh (11th) day of October, 1909, and long prior thereto the plaintiff, Dora E. Rooker, was the owner of the following described real estate in Hamilton County, in the State of Indiana, to-wit:

"All the west half of the north half of Section eighteen (18), Township eighteen (18), north, range five (5), east, lying west of the Lake Erie and Western Railroad, containing ninety-two (92) acres more or less.

"Also, the southwest quarter of Section seven (7), township eighteen (18), north, range five (5) east lying west of the Lake Erie and Western Railroad and east of White River containing forty-eight (48) acres more or less. [Printed Transcript page 2].

"Also, the southwest quarter of section twelve (12), township eighteen (18), north, range four (4), east, containing sixty

(60) acres more or less and lying south and east of White River.

[fol. 5] "Also, that part of the northeast quarter of section thirteen (13), township eighteen (18), north, range four (4), east, more particularly described as follows: Beginning at the northeast corner of said section and running thence west with said section line one hundred and thirty-two (132) rods, more or less, to White River, thence southerly along said stream with the meanderings thereof to a point thirty-nine and ninety-five hundredths (39.95) rods south of the north line of said section; thence east sixty-five and eighty hundredths (65.80) rods; thence south seventy-three and fifteen hundredths (73.15) rods; thence east sixty-eight and twenty-five hundredths (68.25) rods; thence north one hundred fifteen and twenty hundredths (115.20) rods, to the place of beginning, containing seventy-five (75) acres more or less.

7. That on, to-wit, the eleventh (11th) day of October, 1909, and long prior thereto the plaintiffs, as tenants by the entireties were the owners of the following described real estate in Marion County, in the State of Indiana, to-wit: The southeast quarter of the northeast quarter of section thirty-three (33), township seventeen (17), north, range four (4), east, containing forty (40) acres more or less; also, the southwest quarter of the northwest quarter of section thirty-three (33), township seventeen (17), north, range four (4), east, containing forty (40) acres more or less.

8. That on, to-wit, the eleventh (11th) day of October, 1909, the plaintiffs for the consideration therein stated executed to and with the defendant, Fidelity Trust Company, a certain contract in writing [fol. 6] herein called "the Trust Agreement" in the words and figures following, to-wit:

"This memorandum executed in duplicate at the City of Indianapolis, Indiana, this 11th day of October, 1909, by and between Dora E. Rooker and William V. Rooker, her husband, of Hamilton County, Indiana, first parties, and the Fidelity Trust Company of Indianapolis, Indiana, second party, witnesseth:

"Paragraph 1. That concurrently herewith and as a part of the contract evidenced by this memorandum, the said first parties have this day by their certain written instruments in

the form of a general warranty deed conveyed to second party as trustee, ever upon the conditions and trust and upon the powers and for the uses and purposes herein more particularly set forth, the following real estate in Marion County, in the State of Indiana, to wit:

The southeast quarter of the northeast quarter of section thirty-three (33), township seventeen (17), north, range four (4), east, containing forty (40) acres more or less; also, the southwest quarter of the northwest quarter of section thirty-three (33), township seventeen (17), north, range four (4), east, containing forty (40) acres more or less.

Also, the following real estate in Hamilton County, in the State of Indiana, to-wit: [Printed Transcript Page 3] [fol. 7] All the west half of the north half of section eighteen (18) north, range five (5), east, lying west of the Lake Erie and Western Railroad, containing nine-two (92) acres more or less;

Also, the southwest quarter of section seven (7), township eighteen (18), north, range five (5), east, lying west of the Lake Erie and Western Railroad and east of White River, containing forty-eight (48) acres more or less;

Also, the southwest quarter of section twelve (12), township eighteen (18), north, range four (4), east, containing sixty (60) acres more or less and lying south and east of White River;

Also, that part of the northeast quarter of section thirteen (13), township eighteen (18), north, range four (4), east, more particularly described as follows: Beginning at the northeast corner of said section and running thence west with said section line one hundred and thirty-two (132) rods, more or less to White River; thence southerly along said stream with the meanderings thereof to a point thirty-nine and ninety-five hundredths (39.95) rods south of the north line of said section; thence east sixty-five and eighty hundredths (65.80) rods; thence south seventy-three and fifteen hundredths (73.15) rods thence north one hundred and fifteen and twenty hundredths (115.20) rods to the place of beginning, containing seventy-five (75) acres more or less.

That reference is hereby made to the said warranty deeds and to the several descriptions therein for greater certainty.

"Paragraph 2. That said warranty deed is made ever upon the conditions and trust and upon the powers and for the uses and purposes [fol. 8] herein more particularly set forth, that is to say: Whereas the said Dora E. Rooker, the grantor in said deed and first party herein, is the owner in her own and separate right and estate of the said above described lands situate in said Hamilton County, and the said Dora E. Rooker and William V. Rooker, her husband, grantors in said deed and parties of the first part, are the owners as tenants by the entireties of said real estate situate in said Marion County; and whereas the said Dora E. Rooker in and about the improvement of her said real estate in Hamilton County, Indiana, has heretofore undertaken to erect and construct a dwelling house and outbuildings appurtenant thereto and other necessary and proper structures, and to equip the same with modern utilities and conveniences and in so doing has been obliged to lay out and expend large sums of money, and has been obliged to incur obligations beyond her reasonable expectations and beyond her present means to pay; and whereas, the said improvements have been carried so far toward completion as that they cannot now be abandoned or the work thereon stopped or delayed without great sacrifice and loss to the said Dora E. Rooker and without great injury to her estate; and whereas, it requires Six Thousand and no/100 Dollars (\$6,000.00) to complete said improvements and to pay off indebtedness of said Dora E. Rooker incurred by her, arising out of the making of the said improvements and in the completion and installation thereof, and said Dora E. Rooker represents that all such indebtedness was incurred by [fol. 9] her for her own benefit arising out of the making of said improvements: Now, therefore, it is agreed that the [Printed Transcript Page 4] said Fidelity Trust Company, second party herein, shall and it does hereby accept the title of, in and to said real estate ever upon the conditions and trust and upon the powers and for the uses and purposes following, that is to say:

"Clause A. The Fidelity Trust Company shall pay and it does hereby agree to pay from time to time upon the written order and directions of said Dora E. Rooker not exceeding the sum of Six Thousand and no /100 Dollars (\$6,000.00) for and on account of the erection and construction of said dwelling house,

outbuildings and improvements and their equipment and installation, it being expressly understood and agreed that if a part of said indebtedness is held or may hereafter be held by banks on account of advancements made and which may hereafter be made to said Dora E. Rooker, or to the said William V. Rooker, as the undisclosed principal or said Dora E. Rooker, it is ever understood and agreed that the written order and direction of the said Dora E. Rooker that an indebtedness be paid for her use and benefit, notwithstanding the form of said indebtedness, shall be forever binding and conclusive on all parties concerned that such debt or debts so ordered to be paid is and are in fact and in law the debts of the said Dora E. Rooker, any evidence to the contrary notwithstanding.

"Clause B. The said Fidelity Trust Company may let out [fol. 10] and expend any such sum or sums of money other than those above specified in Clause A of this paragraph as said trust company may deem necessary to protect its interest in and to said real estate, and to perform or better promote the performance of the trust herein and hereby created, and every such advancement or payment so made shall be deemed and taken to be the debt of the said Dora E. Rooker as fully as if the same were made upon her express written direction.

"Clause C. That the said Fidelity Trust Company may obtain or cause to be obtained from any bank or banks upon the promissory note or notes of the said Dora E. Rooker any such sum or sums of money, whether within or in excess of the sum of Six Thousand and no /100 Dollars (\$6,000.00) as may be necessary to the true and better and complete performance of this contract and to the successful maintenance of and care for said real estate and the business thereon conducted.

"Clause D. Said Fidelity Trust Company is hereby appointed, empowered, and authorized as the true and lawful attorney-in-fact of the first parties, and in their separate deed, joint name, place, right and stead to execute a deed of general warranty conveying said real estate or any part or parts thereof upon the limitations hereinafter stated and provided.

"Paragraph 3. Said Fidelity Trust Company shall have and receive for its compensation, trustee's fee of One Hundred and Fifty and no /100 Dollars (\$150.00) and a commission of two per

[fol. 11] cent on all loans and advancements and on any and all moneys laid out and expended by it to protect its interest or to promote the true and better performance of this trust, together with interest on all [Printed Transcript Page 5] such moneys at the rate of six per cent per annum, to be credited semi-annually to said Fidelity Trust Company as a debt and charge against said Dora E. Rooker, and said Fidelity Trust Company shall be entitled to have and receive the usual real estate commission on all or any part of said real estate sold by said Fidelity Trust Company pursuant to this agreement, and said Fidelity Trust Company shall be entitled to have and receive a brokerage fee of one-eighth ($\frac{1}{8}$) of one (1) per cent on all notes for ninety (90) days or less for moneys obtained from any bank to the credit of said Dora E. Rooker on her paper originally made.

"Paragraph 4. It is further ever understood and agreed that at any time within one (1) year after the date of these presents said second party may execute and perform so much of the power to sell and convey as is hereinbefore granted as pertains to said Marion County real estate, provided always that the sum received in consideration therefor shall be net to the credit of said Dora E. Rooker Eighteen Thousand and no /100 Dollars (\$18,000.00) after the payment of the commission hereinbefore mentioned. Should it so happen that said Marion County real estate be not sold within said period of one (1) year for said sum of Eighteen Thousand and no /100 Dollars (\$18,000.00) [fol. 12] plus commission, then after ninety (90) days' notice in writing to be given to first parties by second party, the said second party may publicly advertise said Marion County real estate and sell the same at whatever sum it may bring, and if said Marion County real estate does not sell for lack of a bid, then second party may upon ninety (90) days' notice in writing to be given to the first parties by the second party sell and convey said Hamilton County real estate for whatever it will bring over and above the upset price of sixty-five thousand and no /100 dollars (\$65,000.00). If said Hamilton County real estate does not sell for said sum of Sixty-five Thousand and no /100 Dollars (\$65,000.00) for lack of a bid of that sum, then the said second party hereto may publicly advertise and sell said Marion County real estate after ninety

(90) days' notice given in writing to the first parties by second party at public auction for whatever sum and price said real estate may bring. And if said Marion County real estate upon such sale does not fetch enough to pay the moneys and perform the obligations herein charged upon and against said real estate, then said second party may proceed to sell and sell said Hamilton County real estate in the manner and form prescribed as to said Marion County real estate, after thirty (30) days' notice given in writing to first parties by second party.

"It is ever understood and agreed that said Fidelity Trust Company shall apply the proceeds of any sale or sales of real estate made pursuant to this agreement as follows:

"(1) To the payment of any mortgage or other valid lien, [fol. 13] charge, adverse interest or incumbrance upon and against said real estate or any part of any of the real estate herein described, which may be prior and superior and adverse to the interest of said Fidelity Trust Company. [Printed Transcript Page 6].

"(2) To the payment of moneys advanced by second party to first parties or paid to the use and benefit of first parties as herein authorized and provided.

"(3) To the payment of moneys obtained by said second party from any bank or banks to the use and benefit of said Dora E. Rooker upon her paper as hereinbefore authorized and provided.

"(4) The rest and residue of any money shall be paid to the said Dora E. Rooker, her heirs, executors, administrators and assigns.

"Paragraph 5. It is further understood and agreed that any and every deed of conveyance executed by second party pursuant to the provisions of this contract shall convey to the grantee therein named an absolute and unqualified estate as fully and completely as if such deed were made by the said first parties in their own proper persons, names and rights. And the said first parties do now hereby ratify, approve and confirm any and every such deed made by second party pursuant

to this memorandum and in execution of the powers and upon the trust and confidence herein and hereby imposed.

"Paragraph 6. In execution whereof the several parties hereto [fol. 14] do hereby forever bind themselves, their heirs, executors and assigns."

In execution whereof the several respective parties have hereunto affixed their hands and seals at the date and place first above written.

(Signed) Dora E. Rooker. (Seal.) (Signed) William V. Rooker. (Seal) (Signed) Fidelity Trust Company (Seal), (Signed) Per W. M. Fogarty (Seal), President.
Attest: (Signed) Thomas B. Fulmer, Secretary.

9. That concurrently with said agreement of October 11, 1909, and as a part thereof, said Dora E. Rooker and William V. Rooker at the same time executed their certain trust deed with covenant of warranty to said Fidelity Trust Company as Trustee in the words and figures following, to-wit:

"This indenture witnesseth, That Dora E. Rooker and William V. Rooker, her husband, of Hamilton County, State of Indiana, in consideration of One Dollar (\$1.00) the receipt of which is hereby acknowledged, and other good and valuable considerations by them had, convey and warrant to the Fidelity Trust Company, of Indianapolis, Indiana, Trustee, the following real estate in Hamilton County, State of Indiana, to-wit:

"All the west half of the north half of section eighteen (18), township eighteen (18), north, range five (5), east, lying west of the Lake Erie and Western Railroad, containing ninety-two (92) acres more or less;

"Also, the southwest quarter of section seven (7), township eighteen (18), north, range five (5) east, lying west of the Lake [fol. 15] Erie and Western Railroad and east of White River, containing forty-eight (48) acres more or less; [Printed Transcript Page 7]

"Also, the southwest quarter of section twelve (12), township eighteen (18), north, range four (4), east, containing sixty (60) acres more or less and lying south and east of White River.

"Also, that part of the northeast quarter of section thirteen (13), township eighteen (18), north, range four (4), east, more particularly described as follows: Beginning at the northeast corner of said section and running thence west with said section line one hundred and thirty-two (132) rods more or less to White River; thence southerly along said stream with the meanderings thereof to a point thirty-nine and ninety-five hundredths (39.95) rods south of the north line of said section; thence east sixty-five and eighty hundredths (65.80) rods; thence south seventy-three and fifteen hundredths (73.15) rods; thence east sixty-eight and twenty-five hundredths (68.25) rods; thence north one hundred and fifteen and twenty hundredths (115.20) rods to the place of beginning, containing seventy-five (75) acres more or less.

"To have and to hold said real estate however in trust for the use and benefit of said Dora E. Rooker and to protect and discharge the obligations arising out of claims and liens or the right to liens by reason of improvements made on the above described real estate.

"Said Fidelity Trust Company of Indianapolis, Indiana, as aforesaid, to sell and convey said lands or any part of them at such prices and upon such terms as may be from time to time [fol. 16] dictated in writing by said Dora E. Rooker; to execute the proper trustee's deed or deeds conveying the title thereto in fee simple to the purchaser; it being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as this grantor could herself do, and any such purchaser or purchasers shall in no wise be responsible for the application of the proceeds arising from such sale in the hands of said Fidelity Trust Company of Indianapolis, Indiana.

"And said Fidelity Trust Company of Indianapolis, as such trustee, shall have full power and authority to make contracts in writing for the sale of the foregoing real estate, or any part or all of said real estate, and convey same free and clear of any incumbrance or convey the same subject to any existing incumbrances, and to do any and all acts and to execute any and all papers which may be necessary to protect the interests of this

grantor, the mortgagee and other lienholders in and to said real estate and to conserve the trust hereby created.

"And in the event any such liens or charges against said real estate be paid by the Fidelity Trust Company, trustee, the said Fidelity Trust Company, trustee, shall be subrogated to all the rights of such original lienholders and the same shall be enforceable by it and collectible with interest at the rate of six (6) per cent per annum, to be credited semi-annually as a [fol. 17] debt and charge against said real estate.

"This conveyance is made subject to the taxes for the years 1908 and 1909 and subject, also, to a certain mortgage executed to the [Printed Transcript Page 8] American Central Life Insurance Company by this grantor and William V. Rooker, her husband, on November 19, 1908. Said mortgage secured the payment of a certain principal note of said grantor in the sum of Fourteen Thousand and no/100 Dollars (\$14,000.00) together with interest thereon and recorded in Mortgage Record 52, page 84, in the office of the Recorder of Hamilton County, Indiana.

"In witness whereof said Dora E. Rooker and William V. Rooker, her husband, have hereunto set their hands and seals this eleventh (11) day of October, 1909.

(Signed) Dora E. Rooker. (Signed) William V. Rooker.

STATE OF INDIANA,

County of Marion, ss:

"Before me the undersigned Notary Public personally appeared William V. Rooker and Dora E. Rooker, his wife, and acknowledged the execution of this deed.

"Witness my hand and notarial seal this eleventh (11th) day of October, 1909.

(Signed) Wm. J. McCoy. My commission expires July 23, 1910."

10. That upon its execution said deed was duly recorded in the Recorder's Office of Hamilton County, Indiana.

[fol. 18] 11. That concurrently with said agreement of October 11, 1909, and as part thereof, said Dora E. Rooker and William V. Rooker, at the same time executed their certain trust deed

with covenant of warranty to said Fidelity Trust Company as trustee in the words and figures following, to-wit:

"This indenture witnesseth that William V. Rooker and Dora E. Rooker, husband and wife, of Hamilton County, State of Indiana, in consideration of One Dollar (\$1.00), the receipt of which is hereby acknowledged, and other good and valuable consideration by them had, convey and warrant to Fidelity Trust Company of Indianapolis, Indiana, Trustee, the following real estate in Marion County, to-wit:

"The southeast quarter of the northeast quarter of section thirty-three (33), township seventeen (17), north, range four (4), east containing forty (40) acres more or less;

"Also, the southwest quarter of the northwest quarter of section thirty-three (33), township seventeen (17), north, range four (4) east, containing forty (40) acres, more or less.

"To have and to hold said real estate however in trust for the use and benefit of said grantors, William V. Rooker and Dora E. Rooker, and to protect and discharge the obligations of the trust herein with the powers and limitations as follows:

"Said Fidelity Trust Company of Indianapolis, trustee as aforesaid, to sell and convey said real estate according to the [fol. 19] terms of a certain contract of even date herewith within one (1) year [Printed Transcript Page 9] after the date of these presents for a consideration fixed in said contract, and should it so happen that said real estate be not sold within said period of one (1) year, for the sum nominated in said contract, then after ninety (90) days' notice in writing, to be given to the grantors by the trustee herein, the trustee may publicly advertise said real estate and sell same at public or private sale at such price as it may bring and upon the consummation of such sale as may be made by said Fidelity Trust Company of Indianapolis as such trustee, to execute the proper trustee's deed conveying the title thereto in fee simple to its said purchasers. It being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis, trustee, shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as these grantors could themselves do, and any such purchaser or pur-

chasers shall in no wise be responsible for the application of the proceeds arising from such sale in the hands of the said Fidelity Trust Company of Indianapolis, trustee, but said Fidelity Trust Company is directed to apply the proceeds arising from such sale in the manner and for the purposes set out in the contract entered into between said grantors and said Fidelity Trust Company, trustee, on this date.

"The said Fidelity Trust company of Indianapolis, as such trustee, shall have full power and authority to make contracts [fol. 20] in writing for the sale of the foregoing real estate or any part or all of said real estate and convey the same free and clear of any incumbrance or subject to any existing incumbrances, and to do any and all acts and to execute any and all papers which may be necessary to protect the interest of the grantors in and to said real estate and to conserve the trust hereby created and it is hereby further understood and agreed that if the said Fidelity Trust Company of Indianapolis, as trustee, shall elect to pay any lien, charge or incumbrance existing against said real estate, the said Fidelity Trust Company of Indianapolis, trustee, shall be subrogated to all the rights, title and interest held by the original parties thus paid, and the same shall be collectible and enforceable in its hands, together with interest thereon at the rate of six (6) per cent per annum, to be credited semi-annually to said Fidelity Trust Company as a debit and charge against the grantors and the real estate above described.

"This conveyance is made subject to the taxes for the year 1908 and 1909 and subject, also to a certain mortgage executed March 19, 1909, by the grantors, William V. Rooker and Dora E. Rooker, husband and wife, to Indianapolis Life Insurance Company to secure the payment of one (1) principal note of the sum of Six Thousand and no/100 Dollars (\$6,000.00) and interest coupons thereon, which mortgage is recorded in Mortgage Record 523, Page 128 in the Office of the Recorder of Marion County, State of Indiana.

"In witness whereof said William V. Rooker and Dora E. Rooker have hereunto set their hands and seals this eleventh (11th) day of October, 1909.

(Signed) William V. Rooker. (Signed) Dora E. Rooker.
[Printed Transcript Page 10]

STATE OF INDIANA,
Marion County, ss:

Before me, the undersigned Notary Public, personally appeared William V. Rooker and Dora E. Rooker, husband and wife, and acknowledged the execution of this deed.

Witness my hand and notarial seal this eleventh (11th) day of October, 1909.

(Signed) Wm. J. McCoy, Notary Public. My Commission expires July 23, 1910."

12. That upon its execution said deed was duly recorded in the Recorder's Office of Marion County, Indiana.

13. That upon the execution of said trust agreement and said several trust deeds, each of the parties entered upon the performance of said trust agreement, but soon thereafter said Fidelity Trust Company refused further to perform its duties under said trust agreement and in wrongful disregard and violation of the rights of these plaintiffs in the premises said Fidelity Trust Company renounced its said office of trustee and repudiated said trust agreement; that on, to-wit, October 28, 1912, Mr. Smith and Mr. McNulty, officers of the Fidelity [fol. 22] Trust Company, being duly empowered for the purpose, went to the residence of Dora E. Rooker and William V. Rooker and read to them and delivered to them a copy of a written instrument as follows:

"Demand and Tender of Deed

"To Dora E. Rooker and William V. Rooker, Her Husband, Noblesville, Indiana:

"The undersigned, Fidelity Trust Company, trustee, and Fidelity Trust Company, hereby demand payment to them of the sum of Eighteen Thousand Four Hundred and Fifty-Three Dollars and Thirty-Four Cents (\$18,453.34) due on account of advancements made under agreement of trust and secured by the Hamilton County farm, and demand payment of the sum of One Thousand Two Hundred and Forty Dollars and Seventy Cents (\$1,240.70) due on account of advancements made under agreement of trust and secured by the Marion County farm, making a total of Nineteen Thousand Six

Hundred and Ninety-Four Dollars and Four Cents (\$19,694.04), and the said Fidelity Trust Company, trustee, herewith tenders for delivery its quit claim deeds conveying and quit claiming said Hamilton County and Marion County farms to the original grantors upon payment to them of the foregoing demand; and further gives notice that upon failure to make payment of the aforesaid sum, upon demand now made, that said quit claim deeds will remain at the office of Fidelity Trust Company for delivery until October 30, 1912, upon payment of the aforesaid demand.

[fol. 23] (Signed) Fidelity Trust Company, Trustee, (Signed) by W. M. Fogarty, President. (Signed) Fidelity Trust Company, (Signed) By W. M. Fogarty, President. Attest; (Signed) James G. Flaherty, Secretary. (Seal Fidelity Trust Company, Indianapolis, Ind.)

[Printed Transcript Page 11]

14. On October 30, 1912, Dora E. Rooker, with her husband William V. Rooker, joining, began suit in the Marion Circuit Court against the Fidelity Trust Company, to redeem said trust estate and for an accounting to ascertain the extent of interest of the Fidelity Trust Company in said property and to fix an upset time for the payment of any sum which might be found due to said Fidelity Trust Company; that a receiver was sought to be appointed to take over and hold said real estate upon the terms and conditions of said trust agreement pending said litigation and to perform with respect thereto such duties as the court might from time to time direct and that damages sustained by said Dora E. Rooker, because of the non-performance of said contract be ascertained and that she be given judgment accordingly; that thereafter the venue of said cause was changed to the Hamilton Circuit Court of Indiana, where the same was docketed as Cause Number 16338 and to the records and files in said Cause, these plaintiffs [fol. 24] now make reference for greater certainty; that thereafter said complaint was amended to bring in certain pretended holders of mechanic liens, but these new parties, having heretofore in due form gone out of this case, further reference to them is not required and need not be made after this clause of this Bill of Complaint; that said amended complaint omit-

ting the caption thereof, and the subscription of counsel thereto, averred, viz:

Dora E. Rooker and William V. Rooker, her husband, for cause of action as by amended complaint against the defendant, Fidelity Trust Company of Indianapolis, Indiana, James W. Lilly and Frank D. Stalnaker, doing business as partners in the firm name and style of Lilly & Stalnaker, Illinois Surety Company, Balke & Krause Company, and Daniel I. Neher, say:

That on, to-wit, the eleventh (11th) day of October, 1909, the plaintiff, Dora E. Rooker, her said husband joining, executed their certain warranty deed, wherein and whereby they conveyed to said Fidelity Trust Company the following real estate in Marion County, in the State of Indiana, to-wit: The Southeast quarter of the northeast quarter of section thirty-three (33), township seventeen (17), north, range four (4) east; also, the southwest quarter of the northwest quarter of section thirty-four (34), township seventeen (17), east, said tracts [fol. 25] containing eighty (80) acres, more or less;

And, also, the following real estate in Hamilton County, in the State of Indiana, to-wit; All of the west half of the north half of section Eighteen (18), township eighteen (18), north, range five (5), east, lying west of the Lake Erie and Western Railroad; also, the southwest quarter of section seven (7), township eighteen (18), north, range five (5), east, lying west of the Lake Erie Railroad and east of White River. Also the southwest quarter of section twelve (12), township eighteen (18), north, range four (4), east, lying south and east of White River.

Also, all that part of northeast quarter of section thirteen (13) township eighteen (18), north, range four (4), east, more particularly described as follows: Beginning at the northeast corner of said section and running thence west with said section line one [Printed Transcript Page 12] hundred thirty-two (132) rods more or less to White River; thence southerly along said stream to a point thirty-nine and ninety-five hundredths (39.95) rods south of the north line of said section; thence east sixty-five and eighty hundredths (65.80) rods; thence south, seventy-three and fifteen hundredths (73.15) rods;

thence east sixty-nine and twenty-five hundredths (69.25) rods; thence north one hundred fifteen and twenty hundredths (115.20) rods to the place of beginning, said several tracts of land in Hamilton County containing in all two hundred seventy-five (275) acres, more or less. That said warranty [fol. 26] deed was executed concurrently with a certain instrument of trust defining and limiting the interest and estate of said Fidelity Trust Company in and to said real estate, a copy of which trust agreement marked "Exhibit A" is filed herewith.

That said real estate so conveyed was at the time of the reasonable value of One Hundred Thousand and no/100 Dollars (\$100,000.00); and that in and by said trust agreement said Fidelity Trust Company undertook and agreed to pay off certain indebtedness of said Dora E. Rooker arising out of, and incident to the making of certain improvements on said real estate; that said improvements had at that time been carried so far toward completion as that they could not then be abandoned nor the work thereon stopped or delayed without great sacrifice and loss to the said Dora E. Rooker and without great injury to her estate; that it then required at least Six Thousand and no/100 Dollars (\$6,000.00) to complete said improvements and to pay off said indebtedness of said Dora E. Rooker incurred by her out of the making of said improvements and in the completion and installation thereof; that in consideration of the premises and in consideration of the conveyance of said land to Fidelity Trust Company and in consideration of the promise of said Dora E. Rooker to pay certain rates, fees and charges named and specified in said trust agreement, the said Fidelity Trust Company promised and agreed thereafter to pay from time to time upon the written order [fol. 27] and direction of said Dora E. Rooker Six Thousand and no/100 Dollars (\$6,000.00) for and on account of the erection and construction of said dwelling house, outbuildings and improvements and the equipment and installment thereof and such other sum or sums of money than those above specified as might be necessary to perform or better promote the performance of said trust and to the end that such additional funds might be obtained said Fidelity Trust Company covenanted and agreed to obtain from other bank or banks upon the

promissory note of said Dora E. Rooker all such sums or sum of money whether within or in excess of the sum of Six Thousand and no/100 Dollars (\$6,000.00) as might be necessary to the true and better and complete performance of said contract and to the successful maintenance of and care of said real estate and the business thereon conducted, and to that end it became necessary for said Fidelity Trust Company to protect and preserve the credit of said Dora E. Rooker at the banks at which she did business, and to do every other act as might be necessary and proper to the complete performance of said contract; that said Fidelity Trust Company further [Printed Transcript Page 13] undertook to sell said real estate and close said trust within two (2) years after the date of the execution of said instrument and in the particular manner stipulated and described in Paragraph four (4) of said Trust Deed to which reference is hereby made for greater certainty.

That said Fidelity Trust Company in wrongful disregard of [fol. 28] its duties in the premises and violation of the rights of the said Dora E. Rooker failed and refused to pay off said indebtedness and failed and refused to protect and preserve the credit of said Dora E. Rooker at banks and failed and refused to continue or permit the continuance of the work of said improvement and the completion and installation thereof, but on the contrary said Fidelity Trust Company failed and refused to pay said indebtedness and falsely and wrongfully misrepresented the credit and condition of the said trust estate and wholly destroyed the credit of the said Dora E. Rooker at banks and elsewhere and said Trust Company stopped work on said improvement and forced and required contractors to abandon work thereon in such manner as that said Dora E. Rooker was wholly without recourse against said contractors, and said Fidelity Trust Company caused and required said contractors to turn over and assign to it their said contracts and it wrongfully caused and required them to incumber said real estate and cloud the title thereof with notice of liens and otherwise and it also wrongfully caused them to sue on claims all to the end that said trust estate might be so wasted and wrecked as that said trust estate could the better be appropriated by the said Fidelity Trust Company and to that end it caused its

co-defendants herein to be and become parties to its said breaches of said contract by filing notices of lien and instituting suits against these plaintiffs; that said actions at law are now pending and said liens are of record and these plaintiffs aver that said Fidelity Trust Company is the real party in interest [fol. 29] in said record liens and in said pending actions; that said co-defendants herein are each made parties to answer to their respective interest in the premises; that said Fidelity Trust Company has failed and refused to pay the taxes and interest charged against said real estate but has allowed the same to become delinquent and in default and has refused to sell said real estate or any part thereof though it has had the opportunity so to do, having in one instance had an opportunity to dispose of said real estate in Marion County at a fair cash valuation of Twenty-three Thousand and no/100 Dollars (\$23,000.00); and it failed and refused to make provision for the maintenance of the business carried on on said real estate, by reason whereof crops thereon were wholly lost and said Marion County farm remained idle and wholly unproductive for two (2) years at an annual loss of Fifteen Hundred and no/100 Dollars (\$1,500.00); that by reason of the premises the said Dora E. Rooker has been damaged Fifteen Thousand and no/100 Dollars (\$15,000.00); that prior to the beginning of this suit said Fidelity Trust Company wholly repudiated its said trust and served written notice thereof on these plaintiffs; that a copy of said notice, marked "Exhibit Number One" is filed herewith. [Printed Transcript Page 14]

Wherefore these plaintiffs demand judgment, that an accounting be had of the extent of the interest of said Fidelity Trust Company in and to said property and that a reasonable time [fol. 30] be fixed in which said indebtedness may be paid, and that in the meantime a receiver be appointed to take over and hold said real estate upon the terms and conditions of said trust agreement, and to perform with respect thereto such duties as the court may from time to time direct, and that damages sustained by said Dora E. Rooker, because of the non-performance of said contract, be ascertained and that she be given judgment accordingly; that the said co-defendants of said Fidelity Trust Company be required to set

up their several respective interests in the premises, or on default that they be forever barred and shut out and that the clerk of this court, upon the rendition of such judgment, be ordered and directed to enter of record the release and satisfaction of each and every such lien and incumbrance, and plaintiffs pray for all proper relief.

15. That the said memorandum of trust agreement, marked "Exhibit A" filed with said amended complaint is the same memorandum of trust agreement recited heretofore as Clause Number Eight (8) of this Bill of Complaint to which clause reference is hereby made for greater certainty.

16. That the said memorandum of notice of repudiation of said trust agreement and of renunciation of the office of trustee, marked "Exhibit Number One" is the same memorandum of notice recited heretofore as Clause Number thirteen (13) of this Bill of Complaint, to which clause reference is hereby made for greater certainty.

[fol. 31] 17. On March 24, 1913, the defendant, Fidelity Trust Company, filed its counter claim, called a cross-complaint, in said cause against the plaintiffs, Dora E. Rooker and William V. Rooker, and caused summons to be issued thereon, for, and served upon, said cross-defendants, who are the plaintiffs in this Bill of Complaint. In this cross-complaint the Fidelity Trust Company reaffirmed its act of repudiation by declaring upon the trust agreement of October 11, 1909, as being a mortgage. The cross-complaint averred that the Fidelity Trust Company had made certain advancements to Dora E. Rooker on the security of the trust agreement, it demanded judgment for the amount of its claim and for the foreclosure of the trust deed as a mortgage, and for a decree of sale of the trust estate to pay the judgment to be rendered in the cause. Subsequently this counter claim was amended. In this amended cross-complaint the Fidelity Trust Company did not aver that it was trustee, but, describing its position in the case said that it was "a corporation organized under and pursuant to the laws of Indiana." The averments of the counter claim included that on the eleventh (11th) day of October, 1909 Dora E. Rooker was the owner in her own separate right and estate of certain described lands situate in Hamilton County, Indiana, said lands being the same lands heretofore described in Clause

Number Six (6) of this Bill of Complaint, to which clause reference is hereby made for greater certainty; also, that on said day William V. Rooker and Dora E. Rooker were the owners as [fol. 32] tenants [Printed Transcript Page 15] by the entireties of certain described lands situate in Marion County, Indiana, said lands being the same lands heretofore described in Cause Number Seven (7) of this Bill of Complaint to which clause reference is hereby made for greater certainty; also, that in the course of the erection of a dwelling house on her Hamilton County land said Dora E. Rooker had become involved beyond her present means to pay and being then desirous of borrowing certain sums of money for the purpose of paying off existing debts and of completing the improvements which were then in process of construction and for the purpose of carrying on the business of said Dora E. Rooker which consisted in operating the farm lands hereinafter described, entered into a written contract wherein it was mutually agreed that the said cross-plaintiff, Fidelity Trust Company, should pay, and it did agree to pay the sums necessary to carry out the said purposes of Dora E. Rooker and such further sums as said Trust Company might deem necessary to protect its interests in the premises; that it was further agreed that said Fidelity Trust Company should have and receive for its compensation a fee of One Hundred Fifty and no/100 Dollars (\$150.00) and a commission of two (2) per cent on all loans and advancements and on any and all moneys laid out and expended by it to protect its interest and to promote a true and better performance of its trust, together with interest on all such moneys at the rate of six (6) per cent per annum to be credited semi-annually to said cross-complainant, Fidelity [fol. 33] Trust Company, as a debit and charge against the said plaintiff, Dora E. Rooker, a copy of which contract was exhibited with the Complaint; that to secure the repayment of said moneys to cross complainant, Dora E. Rooker, and her husband, William V. Rooker, executed their certain mortgage in form a warranty deed conveying said described lands which deeds were exhibited with the cross-complaint; "Said cross-complainant avers that while said deeds aforesaid were executed to the Fidelity Trust Company, trustee, that the same were

intended to secure the money advanced by said Fidelity Trust Company and that all amounts advanced as herein set forth were advanced by the Fidelity Trust Company under the contract and agreement hereinbefore set out;" that certain described payments of money were made by cross-complainant under said contract; that plaintiffs are committing waste on said premises.

"Wherefore cross-plaintiff sues and demands judgment that the said deeds aforesaid be declared a mortgage, that an accounting be had and that the cross-plaintiff be given judgment against the plaintiff, Dora E. Rooker, for the amounts found due and owing the cross-plaintiff herein together with interest thereon from the dates of the payment thereof; that the amounts so found due and owing cross-plaintiff be adjudged a lien against the real estate herein described and that cross-plaintiff have foreclosure of said mortgage against said Dora E. [fol. 34] Rooker and William V. Rooker and that said real estate or so much thereof as may be necessary for that purpose be sold in satisfaction of the amount found due by the Court, that a receiver be appointed to take charge of the real estate herein described during the equity of redemption and for all proper relief. [Printed Transcript Page 16.]

18. That said memorandum of trust agreement filed with said amended counter claim is the same memorandum of trust agreement recited heretofore in Clause Number Eight (8) of this Bill of Complaint to which clause reference is hereby made for greater certainty.

19. That the said indenture of conveyance of said Hamilton County real estate is the same indenture of conveyance recited heretofore in Clause Number nine (9) of this Bill of Complaint, to which clause reference is hereby made for greater certainty.

20. That the said indenture of conveyance of said Marion County real estate is the same indenture of conveyance recited heretofore in Clause Number eleven (11) of this Bill of Complaint, to which clause reference is hereby made for greater certainty.

21. That upon the incoming of said amended counter claim divers pleas and motions were directed thereat challenging its

interpretation and construction and the sufficiency of the facts therein stated to constitute either: (1) A cause of action in favor of said Fidelity Trust Company against these plaintiffs, therein named as defendants or: (2) A cause of defense in behalf of said Fidelity Trust Company to the amended [fol. 35] complaint of these plaintiffs, who were the plaintiffs in said suit. That said Hamilton Circuit Court heard and determined each of said pleas and motions and exceptions were duly reserved to the court's rulings to the end that they might thereafter be presented as they were in time presented for review to the Supreme Court of Indiana.

22. That thereafter issues were joined upon said amended complaint with answer in general denial and with special answers to which were filed replies; and in like manner issues were joined upon said amended counter claim. And upon the issues so joined said cause was submitted to the court for trial finding and judgment without the intervention of a jury.

23. On December 13, 1913, the trial court rendered judgment to the effect that the trust agreement was in fact and in law a mortgage, foreclosed the same and directed the sale of the trust estate by the sheriff as other lands are sold on execution to pay the judgment debt of Twenty-Three Thousand Two Hundred One and 44/100 Dollars (\$23,201.44). The appeal bond was fixed at Thirty Thousand and no/100 Dollars (\$30,000.00), and thirty (30) days' time was given. There was no supersedeas.

24. On May 15, 1914, the Fidelity Trust Company, having purchased the American Central Life mortgage on the Hamilton County farm in further repudiation of said trust agreement and renunciation of said office of trustee sued Dora E. [fol. 36] Rooker and William V. Rooker in said Hamilton Circuit Court to foreclose said mortgage. Said suit to foreclose said mortgage never came to judgment in favor of said Fidelity Trust Company, but said suit was dismissed.

25. On June 8, 1915, the Sheriff of Marion County, in consideration of Four Thousand and no/100 Dollars (\$4,000.00) paid by [Printed Transcript Page 17] credit on the judgment

rendered in said Cause Number 16,338 in said Hamilton Circuit Court, executed his deed in statutory form, conveying the lands of the trust estate in Marion County to the Fidelity Trust Company, purchaser thereof at sheriff's sale, in disregard of the valuation of said lands at Eighteen Thousand and no/100 Dollars (\$18,000.00) and in further repudiation of said trust agreement and renunciation of said office of trustee.

26. On September 28, 1915, the Sheriff of Hamilton County, in consideration of Twenty Thousand Eight Hundred Sixty-Four and 14/100 Dollars (\$20,864.14), paid by credit of balance in full on the judgment rendered in said Cause Number 16,338 in said Hamilton Circuit Court executed his deed in statutory form, conveying the lands of the trust estate in Hamilton County to the Fidelity Trust Company, purchaser thereof, at sheriff's sale, in disregard of the valuation of said lands at Sixty-Five Thousand and no/100 Dollars (\$65,000.00) and in further repudiation of said trust agreement and renunciation of said office of trustee.

[fol. 37] 27. On October 5, 1915, the Supreme Court of Indiana reversed the judgment of the Hamilton Circuit Court, rendered on December 13, 1913 in said Cause Number 16,338 in said Hamilton Circuit Court, the Supreme Court holding that the instruments in issue were a trust agreement and not a mortgage, and that as such a trust contract was controlled with the law of trusts.

The mandate of the Supreme Court of Indiana on that appeal was: "The judgment of the trial court in the case at bar is contrary to law and must be set aside. Judgment reversed with instructions to sustain appellant's separate and several motions for a new trial, and for further proceedings in accordance with this opinion."

The text of the opinion of the Supreme Court of Indiana on that appeal was as follows:

"SPENCER, C. J.: On October 11, 1909, appellants, Dora E. Rooker and William V. Rooker, as first parties and the appellee, Fidelity Trust Company, as second party, entered into a certain

trust contract and executed as evidence of such contract the following memorandum in writing, omitting the formal parts:

"Witnesseth:

"Paragraph 1. That concurrently herewith and as part of the contract evidenced by this memorandum, the said first parties have this day by their certain written instruments in the form of a general warranty deed, conveyed to the second party as trustee, ever upon the conditions and trust and for [fol. 38] the uses and purposes herein more particularly set forth, the following real estate in Marion County, in the State of Indiana, to-wit: (Here follows description of same.)

"Also the following real estate in Hamilton County, in the State of Indiana to-wit: (Here follows description of same.)

"That reference is hereby made to the said warranty deed and to the several descriptions therein for greater certainty. [Printed Transcript Page 18]

"Paragraph 2. That said warranty deed is made ever upon the conditions and trust and upon the powers and for the uses and purposes more particularly set forth, that is to say:

"Whereas the said Dora E. Rooker, the grantor in said deed and first party herein is the owner in her own and separate right and estate of the said above described land situated in said Hamilton County and the said Dora E. Rooker and William V. Rooker, her husband, grantors in said deed, and parties of the first part, are the owners as tenants by the entireties of said real estate situated in said Marion County, and

"Whereas the said Dora E. Rooker in and about the improvement of her said real estate in Hamilton County, Indiana, has heretofore undertaken to erect and construct a dwelling house and outbuildings appurtenant thereto and other necessary and proper structures and to equip the same with modern utilities and conveniences and in so doing has been obliged to [fol. 39] lay out and expend large sums of money and has been obliged to incur obligations beyond her reasonable expectations and beyond her present means to pay, and

"Whereas, the said improvements have been carried so far toward completion as that they cannot now be abandoned or the work thereon stopped or delayed without great sacrifice

and loss to the said Dora E. Rooker and without great injury to her estate, and

"Whereas, it requires Six Thousand and no/100 Dollars (\$6,000.00) to complete said improvements and to pay off indebtedness of said Dora E. Rooker incurred by her arising out of the making of the said improvements and in the completion and installation thereof, and said Dora E. Rooker represents that all such indebtedness was incurred by her for her own benefit arising out of the making of said improvements.

"Now, therefore, it is agreed that the said Fidelity Trust Company, second party herein, shall and it does accept the title of, in and to said real estate ever upon the conditions and trust and upon the powers and for the uses and purposes following, that is to say:

"Clause A. The Fidelity Trust Company shall pay and it does hereby agree to pay from time to time upon the written order and direction of said Dora E. Rooker not exceeding the sum of Six Thousand and no/100 Dollars (\$6,000.00) for and on account of the erection and construction of said dwelling house, outbuildings and improvements and the equipment and [fol. 40] installation thereof, it being expressly understood and agreed that if a part of said indebtedness is held or may hereafter be held by banks on account of advancements made and which may hereafter be made to said Dora E. Rooker, or to the said William V. Rooker, as the undisclosed principal of said Dora E. Rooker, it is ever understood and agreed that the written order and direction of the said Dora E. Rooker that an indebtedness be paid for her use and benefit, notwithstanding the form of said indebtedness, shall be forever binding and conclusive on all parties concerned that such debt or debts so ordered to be paid is and are in fact and in law the debts of the said Dora E. Rooker, any evidence to the contrary notwithstanding. [Printed Transcript Page 19.]

"Clause B. The said Fidelity Trust Company may let out and expend any such sum or sums of money other than those above specified in Clause A of this paragraph as said Trust Company may deem necessary to protect its interest in and to said real estate and to perform or better promote the performance of the trust herein and hereby created and every

such advancement or payment so made shall be deemed and taken to be the debt of the said Dora E. Rooker as fully as if the same were made upon her express written direction.

"Clause C. That the said Fidelity Trust Company may obtain or cause to be obtained from any bank or banks upon the promissory note or notes of the said Dora E. Rooker and [fol. 41] such sum or sums of money, whether within or in excess of the sum of Six Thousand and no/100 Dollars (\$6,000.00) as may be necessary to the true and better and complete performance of this contract and to the successful maintenance of and care for said real estate and the business thereon conducted.

"Clause D. Said Fidelity Trust Company is hereby appointed, empowered and authorized as the true and lawful attorney-in-fact of the first parties and in their separate deed, joint name, place, right and stead to execute a deed of general warranty conveying said real estate or any part or parts thereof upon the limitations herein stated and provided.

"Paragraph 3. Said Fidelity Trust Company shall have and receive for its compensation, trustee's fee of One Hundred and Fifty and no/100 Dollars (\$150.00) and a commission of two (2) per cent on all loans and advancements and on any and all moneys laid out and expended by it to protect its interest or to promote the true and better performance of this trust, together with interest on all such moneys at the rate of six (6) per cent per annum, to be credited semi-annually to said Fidelity Trust Company as a debit and charge against said Dora E. Rooker and said Fidelity Trust Company shall be entitled to have and receive the usual real estate commission on all or any part of said real estate sold by said Fidelity Trust Company, pursuant to this agreement and said Fidelity Trust Company shall be entitled to have and receive a brokerage fee of one-eighth ($\frac{1}{8}$) of one (1) per cent of all moneys obtained from any bank to the credit of said Dora E. Rooker on her paper originally made. [fol. 42] "Paragraph 4. It is further ever understood and agreed that at any time within one (1) year after the date of these presents said second party may execute and perform so much of the power to sell and convey, as is hereinbefore granted, as pertains to said Marion County real estate provided always

that the sum received in consideration therefor shall be net to the credit of said Dora E. Rooker Eighteen Thousand and no/100 Dollars (\$18,000.00) after the payment of the commission hereinbefore mentioned. Should it so happen that said Marion County real estate be not sold within said period of one (1) year for said sum of Eighteen Thousand and no/100 Dollars (\$18,000.00) plus commission, then after ninety (90) days' notice in writing to be given to first parties by second party, the [Printed Transcript Page 20] said second party may publicly advertise said Marion County real estate and sell the same at whatever sum it may bring and if said Marion County real estate does not sell for lack of a bid, then second party may upon ninety (90) days' notice in writing to be given to the first parties by the second party sell and convey said Hamilton County real estate for whatever it will bring over and above the upset price of Sixty-five Thousand and no/100 Dollars (\$65,000.00). If said Hamilton County real estate does not sell for said sum of Sixty-five Thousand and no/100 Dollars (\$65,000.00) for lack of a bid of that sum, then the said second party hereto may publicly advertise and sell said Marion County real estate after ninety (90) days' notice given in writing to [fol. 43] first parties by second party at public auction for whatever sum and price said real estate may bring. And if said Marion County real estate upon such sale do not fetch enough to pay the moneys and perform the obligation herein charged upon and against said real estate, then said second party may proceed to sell, and sell, said Hamilton County real estate, in the manner and form prescribed as to said Marion County real estate, after thirty (30) days' notice given in writing to first parties by second party.

"It is ever understood and agreed that said Fidelity Trust Company shall apply the proceeds of any sale or sales of said real estate made pursuant to this agreement, as follows:

"(1) To the payment of any mortgage or other valid lien, charge, adverse interest or incumbrance upon and against said real estate, or any part of any of the real estate herein described, which may be prior and superior and adverse to the interest of said Fidelity Trust Company.

"(2) To the payment of moneys advanced by second party to first parties or paid to the use and benefit of first parties as herein authorized and provided.

"(3) To the payment of moneys obtained by said second party from any bank or banks to the use and benefit of said Dora E. Rooker upon her paper as hereinbefore authorized and provided.

"(4) The rest and residue of any money shall be paid to the [fol. 44] said Dora E. Rooker, her heirs, executors, administrators and assigns.

"Paragraph 5. It is further understood and agreed that any and every deed of conveyance executed by second party pursuant to the provisions of this contract shall convey to the grantee therein named an absolute and unqualified estate as fully and completely as if such deed were made by the said first parties in their own proper persons, names and rights. And the said first parties do now hereby ratify, approve and confirm any and every such deed made by second party pursuant to this memorandum and in execution of the powers and upon the trust and confidence herein and hereby imposed.

"Paragraph 6. In execution whereof the several parties hereto do hereby forever bind themselves, their heirs, executors and assigns."

"Contemporaneously with the execution of the above memorandum and as part of the same transaction, appellants executed to the Fidelity Trust Company, as trustee, two (2) indentures in the form of [Printed Transcript Page 21] warranty deeds, in which the real estate referred to in the above memorandum was conveyed to said trustee on terms and conditions. The deed to the Hamilton County lands provided that the Trust Company should hold said real estate

"in trust for the use and benefit of said Dora E. Rooker and to protect and discharge the obligations arising out of claims and liens or the right to liens by reason of improvements made on the above described real estate.

[fol. 45] "Said Fidelity Trust Company of Indianapolis, Indiana, as aforesaid, to sell and convey said lands or any part of them at such prices and upon such terms as may be, from

time to time, dictated in writing by said Dora E. Rooker; to execute the proper trustee's deed or deeds conveying the title thereto in fee simple to the purchaser; it being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis, shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as this grantor could herself do, and any such purchaser or purchasers shall in no wise be responsible for the application of the proceeds arising from such sale in the hands of said Fidelity Trust Company of Indianapolis, Indiana.

"And said Fidelity Trust Company of Indianapolis, Indiana, as such trustee, shall have full power and authority to make contracts in writing for the sale of the foregoing real estate, or any part or all of said real estate and convey same free and clear of any incumbrance, or convey the same subject to any existing incumbrances, and to do any and all acts and to execute any and all papers which may be necessary to protect the interests of this grantor, the mortgagee and other lienholders in and to said real estate and to conserve the trust hereby created.

"And in the event any liens or charges against said real estate be paid by the Fidelity Trust Company, trustee, the said Fidelity Trust Company, trustee, shall be subrogated to all [fol. 46] the rights of such original lienholders and the same shall be enforceable by it and collectible with interest at the rate of six (6) per cent per annum, to be credited semi-annually as a debt and charge against said real estate."

The deed to the Marion County lands provided that the Trust Company should hold said real estate "in trust for the use and benefit of said grantors, William V. Rooker and Dora E. Rooker, and to protect and discharge the obligations of the trust herein with the powers and limitations as follows:

"Said Fidelity Trust Company of Indianapolis, trustee, as aforesaid, to sell and convey said real estate according to the terms of a certain contract of even date herewith, within one (1) year after the date of these presents for a consideration fixed in said contract, and should it so happen that said real estate be not sold within the said period of one (1) year, for the sum nomi-

nated in said contract, then after ninety (90) days' notice in writing to be given to the grantors by the trustee herein, the trustee may publicly advertise said real [Printed Transcript Page 22] estate and sell same at public or private sale at such price as it may bring and upon the consummation of such sale as may be made by said Fidelity Trust Company of Indianapolis as such trustee to execute the proper trustee's deed conveying the title thereto in fee simple to its said purchasers, it being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis, trustee, shall convey [fol. 47] a good and indefeasible title in fee simple to such purchaser or purchasers as fully as these grantors could themselves do, and any such purchaser or purchasers shall in nowise be responsible for the application of the proceeds arising from such sale in the hands of the said Fidelity Trust Company of Indianapolis, trustee, but said Fidelity Trust Company is directed to apply the proceeds arising from such sale in the manner and for the purposes set out in the contract entered into between said grantors and said Fidelity Trust Company, trustee, on this date.

"The said Fidelity Trust Company of Indianapolis, as such trustee, shall have full power and authority to make contracts in writing for the sale of the foregoing real estate or any part or all of said real estate and convey the same free and clear of any incumbrance or subject to any existing incumbrances, and to do any and all acts and to execute any and all papers which may be necessary to protect the interests of the grantors in and to said real estate and to conserve the trust hereby created and it is hereby further understood and agreed that if the said Fidelity Trust Company of Indianapolis, as trustee, shall elect to pay any lien, charge or incumbrance existing against said real estate, the said Fidelity Trust Company of Indianapolis, trustee, shall be subrogated to all the rights, title and interest held by the original parties thus paid and the same shall be collectible and enforceable in its hands, together [fol. 48] with interest thereon at the rate of six (6) per cent per annum to be credited semi-annually to said Fidelity Trust Company as a debit and charge against the grantors and the real estate above described."

"Each conveyance was made subject to unpaid taxes and to certain described mortgages.

"On October 30, 1912, appellants brought an action in the Marion Circuit Court against appellee, in which they charged a violation of the trust agreement, and asked for an accounting and for the appointment of a receiver to carry out the trust embodied in said contract. Later the cause was venued to the Hamilton Circuit Court where appellants filed an amended complaint in which the firm of Lilly and Stalnaker, the Illinois Surety Company, the Balke & Krauss Company, and one Daniel I. Neher were joined as party defendants to answer as to their respective interests in the premises, if any. Of these defendants, Lilly and Stalnaker and the Illinois Surety Company filed disclaimers, and Neher was subsequently defaulted, while the interest of the Balke & Krauss Company, represented by a judgment against the Hamilton County real estate, was found on final hearing to have been assigned to appellee and said judgment was merged in the judgments in this cause. [Printed Transcript Page 23]

"Appellee entered a general denial to the amended complaint and also filed an amended counter claim, denominated a cross-complaint, in which it alleged the payment of large sums of money by it in accordance with the terms of the trust agreement and for the protection of its rights thereunder. It [fol. 49] further charged waste on the part of appellants and asked that an accounting be had; that the deeds above described be declared a mortgage and foreclosed; and that a receiver be appointed to take charge of the property during the year of redemption. We deem it unnecessary to make extended reference to the several motions addressed by appellants to this pleading, nor to the ten (10) paragraphs of special and partial answer filed thereto. It is sufficient to say in general: (1) That they present appellants' theory that the instruments above set out constitute a trust agreement which, it is charged, has been violated and abused in the particulars set forth; and (2) that they oppose the position taken by appellee that the conveyance, while in form of trust deeds, in fact constitute a mortgage which was executed as security for the repayment of advancements made by it. The issues were closed with

an answer of general denial to the counter-claim and with a reply in denial to the several paragraphs of special and partial answer filed by appellants. The cause was tried by the court which, at request of appellants, made a special finding of facts and also a general finding, in which it found against appellants on the issues presented by their amended complaint and in favor of appellee on the issues joined on its amended counter-claim.

"The court thereupon rendered judgment, foreclosing the mortgage and directing a sale of the property in question, and at the same time rendered personal judgments which determined [fol. 50] the matter of costs as between the Illinois Surety Company, Lilly and Stalnaker, Daniel I. Neher, and appellants. None of the parties last above mentioned, other than appellants, is now before this court and as this is a vacation appeal, appellee insists it should be dismissed without an inquiry into the merits for the reason that all the parties to the judgment below are not named in the assignment of errors in this court. This appeal, however, is from the judgment in rem rendered on the issues which involve the construction of the instruments herein set out and does not question the personal judgments which determined only certain matters of costs. No parties, other than appellants and appellee, are affected by the judgment from which this appeal is prosecuted, and they are the only necessary parties to the proceeding.

Zimmerman. v. Gaumer (1898), 152 Ind. 552, 554, 53 N. E. 829;

Lowe v. Turpie (1896), 147 Ind. 652, 692; 44 N. E. 25; 47 N. E. 150; 37 L. R. A. 238.

"The principal question to be determined here is the proper construction to be given to the instruments which are made the basis of this action. In support of its contention that the deeds in question in fact constitute a mortgage, appellee relies on the following propositions of law: [Printed Transcript Page 24]

"(1) That different instruments, executed at the same time, relating to the same matter constitute one transaction and must be read and construed together.

[fol. 51] *Knepper v. Eggiman* (1911), 177 Ind. 56, 62; 97 N. E. 161;

Schmueckle v. Waters (1890), 125 Ind. 265, 267; 25 N. E. 281.

"(2) That any conveyance of real estate, whatever its form, which is in fact executed for the purpose of securing a debt is a mortgage.

Sinclair v. Gunsenhauser (1912), 179 Ind. 78, 121; 98 N. E. 37; 100 N. E. 376;

Brown v. Follette (1900), 155 Ind. 317, 321; 58 N. E. 197;
Lowe v. Turpie, *supra*.

"(3) That the power of sale contained in the instruments here involved does not exclude the right of foreclosure by judicial proceeding.

Sinclair v. Gunsenhauser, *supra*;

Eaton, Etc., R. Co. v. Hunt (1863), 20 Ind. 457, 461; Sec. 4029 Burns R. S. 1914; Sec. 2986 R. S. 1881.

"There can be no doubt that the general rule which precludes the admission of parol or extrinsic evidence to vary or contradict the terms of a written instrument is subject to the exception that a deed absolute on its face may, in equity, be shown by parol evidence to have been intended to have the effect of a mortgage merely. This exception has found frequent expression in the decisions of this and the appellate court, and its existence as an established rule is conceded by appellants. It is their contention, however, that it has no application where, as in this case, the deed or other instrument of conveyance is but one element in a transaction which has been reduced to writing in its entirety and is evidenced by a memorandum embodying all of its terms. This position is well taken. As recently stated by this court, where there is a formal written [fol. 52] contract which appears to be complete within itself, it will be presumed to be the repository of the final intentions of the parties in regard to the subject matter of this agreement. Oral declarations relative thereto will be disregarded and the rights of the parties determined as they appear from the written instrument.

Strebel v. Bligh, 183 Ind. 537; 109 N. E. 45.

"The instruments now before us embody but one contract, the terms of which are stated in the memorandum above set out, and the legal force and effect of the trust deeds, as they are termed, depend upon the intention of the parties as it is evidenced by said memorandum. From the terms of this instrument, there can be no doubt that it was one purpose of appellants to provide therein for the repayment to appellee of such sum or sums as it should advance to them or expend in their behalf. To that extent the instruments may [Printed Transcript Page 25] be construed as affording security to appellee for money advanced, but not every instrument which affords security is a mortgage, nor is it the primary or sole purpose of the contract in this case to insure the payment of appellees' claim and no others. Appellees were the owners of a considerable amount of real estate, on a part of which certain improvements were contemplated and were in fact under course of construction. The expense of these improvements proved greater than was anticipated and the claims of creditors were being pressed. It became evident that to prevent great sacrifice or loss to the estate, provision had to be made for the [fol. 53] completion of the work in hand, for the proper maintenance of the property until disposed of and for the payment of debts owing by appellants. To that end the agreement evidenced by the instruments here in suit was entered into and all parties thereto obligated themselves, their representatives and assigns, to the proper performance of its terms. The evident purpose of its execution and the language used by the parties makes it clear that at the time it was entered into the agreement was treated as a trust and not as a mortgage.

"Reference may here be made to the case of *Taylor v. Cornelius* (1869), 60 Pa. St. 187, and *Woodruff V. Robb* (1850), 19 Ohio 212, to which our attention is called by appellee as decisive of the questions here presented. Without reviewing these decisions at length, it may be noted that in each case the instruments in suit contained a condition of defeasance which provided, in substance, that on payment of certain debts, the property or so much as remained thereof, should be reconveyed to the grantor in the trust deed. In the case at bar, no provision is made for the reconveyance to appellants of the real

estate involved or any part thereof. The fair construction of the instruments before us is that an effort on the part of appellants to provide for the conversion of their property into money in order that their just debts might be paid. As such it is a contract governed by the law of trusts. True, provision is [fol. 54] made for the advancement of certain sums of money by appellee to appellants or on their order, but it is apparent that the advancements so made do not supply the entire consideration for the execution of the contracts and they are to be included among debts to be paid out of the funds realized from the sale of the lands in question. If, by reason of the improvements contemplated or other circumstances, the proceeds realized from the sale of said lands be more than sufficient to pay all obligations, then the residue of such proceeds is to go to appellant, Dora E. Rooker, her heirs and assigns. To that extent they may be said to possess an equitable interest in the estate and their position with reference thereto is somewhat analogous to that of other creditors, but nowhere in the instruments of conveyance is there a contingency expressed or implied, on the happening of which appellants, or either of them, would be entitled to a reconveyance of any part of said lands.

"The distinction between an absolute deed of trust and a deed of trust in the nature of a mortgage is clearly stated in *Hoffman, Burneston & Co. v. Mackall* (1885), 5 Ohio St. 124, 64 Am. Dec. 637, and the decision in that case supports our construction of the [Printed Transcript Page 26] instruments here in controversy. We quote from the opinion (p. 130) as follows: "There is a manifest and well settled distinction between an unconditional deed of trust, and a mortgage or deed of trust in the nature of a mortgage. The former is an absolute and indefeasible conveyance of the subject matter thereof, for the purpose expressed; whereas the latter is conditional and defeasible. A mortgage is the conveyance of an estate, or pledge [fol. 55] of property, as security for the payment of money or the performance of some other act, and conditioned to become void upon such payment or performance. A deed of trust in the nature of a mortgage is a conveyance in trust by way of security, subject to a condition of defeasance, or redeemable at any time before the sale of the property. A deed con-

veying land to a trustee as mere collateral security for the payment of a debt, with the condition that it shall become void on the payment of the debt when due, and with power to sell the land in case of a default on the part of the debtor, is a deed of trust in the nature of a mortgage. By an absolute deed of trust, the grantor parts absolutely with the title, which rests in the grantee unconditionally, for the purpose of the trust. The latter is a conveyance to a trustee for the purpose of raising a fund to pay debts, while the former is a conveyance in trust for the purpose of securing a debt, subject to a condition of defeasance. The court concludes in language applicable here, that it 'is manifest from this distinction that the conveyance in controversy in this case was not a mortgage or deed of trust in the nature of a mortgage but an absolute deed of trust.'

"The judgment of the trial court in the case at bar is contrary to law and must be set aside. Judgment reversed, with instructions to sustain appellants' separate and several motions for a new trial, and for further proceedings in accordance with this opinion."

Rooker v. Fidelity Trust Co., 185 Ind. 172, 181-188.

[fol. 56] 28. And plaintiffs say and would show unto the court that in and by said opinion and mandate of said Supreme Court the State of Indiana forever fixed and determined the obligation of said trust agreement, and allocated to said obligation all the remedies and processes of the law of said State which forever should attend the obligation of said contract; and that having in the manner and form aforesaid allocated to said obligation all the remedies and processes of law of said State which should attend the obligation of said contract, said State thereby and at the same time withdrew said obligation from the further inquiry and determination of all the courts of said State and thereby and at the same time so fixed and determined the law of said State to be such that no issue de novo concerning said contract and its obligation would thereafter be within the jurisdiction of any court of said State and that should any issue de novo be attempted to be made concerning said contract and its obligation in any court of said State such proceeding would be coram non iudice and void. And plaintiffs say and would show unto the court that in and

by said opinion and mandate said Supreme Court remanded said cause to said Hamilton Circuit Court for the sole purpose of taking further proof upon the issues joined and for no other purpose whatsoever and that no other purpose than the taking of further proof upon said issue was within the jurisdiction of any court of said State and said jurisdiction was by law confined solely and exclusively to said Hamilton Circuit Court.

[fol. 57] 29. And plaintiffs further say and would show unto the court that after the execution of said contract and after the same had become the subject of pending litigation the State of Indiana enacted a statute entitled, "An Act concerning proceedings in civil and criminal cases" approved March 15, 1913. (Acts 1913 P. 850; 1 Burns R. S. 1914 Sec. 343 A); that on March 5, 1915, there was approved an act of the General Assembly of Indiana, entitled, "An Act to amend an act, entitled 'An act concerning proceedings in civil and criminal cases,' approved March 15, 1913."

This amended act in so far as it is germane here is as follows:

"Sec. 1. That hereafter in all pleadings, papers, or writings which are filed in or before any court in any civil * * * case, or in any proceedings of any kind where the sufficiency of the same can, may be or is called in question, that all recitals therein, and all statements contained in any participial expression or following the words 'having' or 'being' shall be considered and held to be allegations of fact whenever necessary to the sufficiency thereof, and all conclusions stated therein shall be considered and held to be the allegation of all the facts required to sustain said conclusion when the same is necessary to the sufficiency of such pleading, paper or writing. Provided, That as against such conclusions only the following remedy is given, that a motion may be made to require the party filing such pleading, paper or writing to state the facts necessary [fol. 58] to sustain the conclusion alleged, said motion setting out wherein such pleading, paper or writing is insufficient. If no such motion is made and ruled upon, all objections on account thereof are waived.

(Indiana Acts 1915, p. 123; 5 Burns R. S. 1921, Sec. 343a)

30. And plaintiffs say and would show unto the court that until the approval of said Amended Act of the General Assembly of the State of Indiana, of March 5, 1915 it was the law of Indiana concerning appeals that "Appeals may be taken from the Circuit Courts * * * to the Supreme Court, by either party, from all final judgments, except in actions originating before a Justice of the Peace or Mayor of a city where the amount in controversy, exclusive of interest and cost, does not exceed Fifty Dollars (\$50.00); Provided, however, That this exception shall not apply to prohibit an appeal in cases originating before a Justice of the Peace or a Mayor of a city, involving the validity of an ordinance passed by an incorporated town or city. The party obtaining judgment shall not appeal after receiving any money paid or collected thereon."

31. And plaintiffs say and would show unto the court that until the approval of said amended act of the General Assembly of the State of Indiana, of March 5, 1915, it was the law of Indiana that on appeal to the Supreme Court where "the judgment is reversed in whole [Printed Transcript Page 28] or in part the Supreme Court shall remand the case to the court below, with instructions for a new trial, where the justice of the case requires it; but if no new trial is required, [fol. 59] with particular instructions relative to the judgment to be rendered and all modifications thereof."

32. And plaintiffs say and would show unto the court that until the approval of said Amended Act of March 5, 1915, it was the law of Indiana that on appeal to the Supreme Court that Court "may reverse or affirm the judgment below in whole or in part and remand the cause to the court below, but the Supreme Court shall not reverse the proceedings further than to include the first error."

33. The plaintiffs say and would show unto the court that until the approval of said Amended Act of March 5, 1915, it was the law of Indiana that the jurisdiction of a circuit court upon a mandate from the Supreme Court was limited to the instructions and directions given to the Circuit Court in the opinion of the Supreme Court and that the re-examination in the Circuit Court of matters determined in the opinion and judgment of

the Supreme Court was a subject coram non judice, and any action thereon by said Circuit Court would be and was beyond the jurisdiction of said Circuit Court and void.

34. And plaintiffs say and would show unto the court that until the approval of said Amended Act of March 5, 1915, it was the law of Indiana that the Supreme Court was without process and without authority to re-examine its own opinion after mandate and after such mandate had been received and acted upon by the parties in the court to which such mandate was directed.

35. And plaintiffs say and would show unto the court that until the approval of said Amended Act of March 5, 1915, it [fol. 60] was the law of Indiana that a Circuit Court was without process and authority to stay, avoid or annul the execution of a mandate of the Supreme Court and that any attempt by a Circuit Court to stay, avoid or annul the execution of a mandate of the Supreme Court was coram non judice and any judgment therein was void.

36. And plaintiffs say and would show unto the court that until the approval of said Amended Act of March 5, 1915, it was the law of Indiana that the Supreme Court of the State could not make valid and lawful a judgment of a Circuit Court of the State which was void.

37. And plaintiffs say and would show unto the court that said Amended Act as interpreted and construed by the courts of Indiana in this case, impairs the obligation of said trust agreement by allowing the Fidelity Trust Company to plead its own conclusions instead of the facts, all to the end that false interpretations may be and are substituted in the place and stead of the truth and that the facts in the premises may be and are wholly disregarded; and in this particular said Fidelity Trust Company was permitted to substitute its conclusion in the place of the truth as to the (1) the meaning of said trust agreement; and (2) as to the facts which should constitute and did constitute performance thereof; and (3) as to the remedies and processes of law which legally and rightfully should attend the [Printed Transcript page 29] enforcement of said trust agreement; and (4) as to the meaning and effect of said opinion,

mandate and judgment of the Supreme Court of Indiana [fol. 61] reversing said judgment of said Hamilton Circuit Court; and (5) as to the remedies and processes of law which legally and rightfully should attend the enforcement of said opinion and judgment; that each and all said conclusions of said Fidelity Trust Company were by it imposed upon and adopted by the courts of Indiana in the procedure in said Cause Number 16838 after said decision on appeal by said Supreme Court; that each of said conclusions was wholly false; that by reason of the premises the truth and the facts in respect of said trust agreement were suppressed and never were heard and determined in and by said courts of Indiana after said judgment of reversal; and by reason thereof said Statute impaired the obligation of said trust agreement in contravention of Article I, Section 10 of the Constitution of the United States and these petitioners were denied the equal protection of the law and their property was taken without due process of law, all in contravention of the Fourteenth Amendment of the Constitution of the United States; that by reason of the premises all the proceedings and judgments of said courts of Indiana following said judgment of reversal by said Supreme Court of said judgment of said Hamilton Circuit Court are unlawful and void and they should be so declared and adjudged in this action.

38. And plaintiffs say and would show unto the court that until the approval of said Amended Act of the General Assembly of the State of Indiana, of March 5, 1915, it had been and was the law of Indiana that an executory contract when reduced to a cause of action of which a court had assumed jurisdiction, [fol. 62] ceased eo instante to remain executory and so became actionable as that in the circumstances of the case; (1) there arose in favor of the party not in default an action on the contract; or (2) there arose in favor of the party not in default an action as on the quantum meruit; or (3) there arose in favor of the party in default an action as on the quantum valebat to recover the value of benefits received and accepted in excess of damages sustained because of the breach of such contract. But nowhere in the law of Indiana, until the approval of said statute was there any authority to the effect that a contract could be

concurrently executory and actionable and particularly was there no authority in the laws of Indiana to the effect that a contract once adjudged to be in action because of a breach of its obligation, could remain and continue to be executory and performable in pais with the right outstanding that any subsequent acts in pais could create thereafter any right of action or action de novo on said contract.

39. And plaintiffs say and would show unto the court that until the approval of said Amended Act of March 5, 1915, it had been and was the law of Indiana that (1) in the absence of fraud, accident or mistake set forth in a suit to reform the instrument the terms of a written contract could not be varied with parol evidence; (2) that a written contract exhibited with a pleading controlled the averments of the pleading and struck down all such averments as were [Printed Transcript page 30] in conflict with the terms of the contract; (3) that a written [fol. 63] contract recited in a special finding of facts controlled the findings and struck down all recitals therein which were inconsistent with the terms of the contract.

40. And plaintiffs say and would show unto the court that until the approval of said Amended Act of March 5, 1915, it had been and was the law of Indiana that in an action on a contract the party asserting any right thereunder must recover on the single and definite theory of his complaint, *secundum allegata et probata*, or not at all.

41. And plaintiffs say and would show unto the court that until the approval of said Amended Act of March 5, 1915, it had been and was the law of Indiana that one who had heretofore repudiated a contract should not thereafter be heard upon a right to reinstate said contract as executory, unless and until he who asserted such claim of right should first offer to do equity and offer compensation for the wrongs which had arisen out of such act or acts of repudiation.

42. And plaintiffs say and would show unto the court that until the approval of said Amended Act of March 5, 1915, it had been and was the law of Indiana that the *cestui que* trust of a trust estate was in equity the owner thereof, and that such ownership could not be divested nor impaired with any act of the trustee inconsistent with the terms of the trust.

43. And plaintiffs say and would show unto the court that until the approval of said Amended Act of March 5, 1915, it was the right and the duty of cestui que trust upon an act of repudiation or a breach of duty by the trustee to sue (1) for [fol. 64] the recovery of damages arising out of such act of repudiation or breach of duty by the trustee; and (2) to redeem the trust estate from the offending trustee; and (3) to have an accounting of the interest of the trustee, if any, with a declaration and adjudication by the court of the terms and conditions of the redemption of the trust estate by the cestui que trust from the offending trustee; and (4) to have the trust estate cared for and preserved by a receiver pending the process of accounting, distribution and redemption.

44. And plaintiffs say and would show unto the court that until the approval of said Amended Act of March 5, 1915, it had been and was the law of Indiana that where one court had jurisdiction of the parties and the subject matter of an action at law or a suit in equity all other courts were without jurisdiction of said parties and said cause and that where in the presence of a vested jurisdiction another and different court attempted to assume jurisdiction of said parties and subject matter the proceedings in such subsequent court were coram non judice and void.

45. And plaintiffs say and would show unto the court that until the approval of said Amended Act of March 5, 1915, it had been and was the law of Indiana that an action in contract and an action sounding in tort could not at one and the same time be maintained in one and the same cause but that upon the facts the party should elect his remedy whether in contract or in tort and that such election once made was conclusive and irrevocable; also, that an action for an [Printed Transcript page 31] [fol. 65] accounting was an action in contract and that an action to quiet title was an action in tort and that said actions could not be prosecuted and maintained concurrently in the same cause.

46. And plaintiffs say and would show unto the court that on June 27, 1917, and notwithstanding the fact and the law that further jurisdiction of said Hamilton Circuit Court, in the

premises then and there was acquired, vested and limited wholly and solely upon and by the said mandate of said Supreme Court and notwithstanding said mandate directed and required only the taking of further proof, or the retrial of the case upon issues joined and determined said Fidelity Trust Company reappeared in said Hamilton Circuit Court and thereafter suing in a dual capacity which it described as "Fidelity Trust Company in its corporate capacity proper and as trustee" filed its pretended second amended counter-claim and supplement thereto, wherein it was averred that said Fidelity Trust Company was the owner in fee simple of the lands of said trust estate; that these petitioners were claiming an interest in the Hamilton County lands of said trust estate; that said claim was unlawful and without right; that said claim was an unlawful cloud upon the said title of said trustee and should be removed; that in and by the judgment of the Marion Circuit Court said claim of these petitioners to an interest in said Marion County lands had been adjudged to be wrongful and unlawful and these petitioners had been restrained and [fol. 66] enjoined forever from asserting any interest whatsoever in said real estate of said trust estate; the prayer of said counter claim included that the title of said Trust Company be quieted as against the claim of these petitioners to any interest in said trust estate and that these petitioners be restrained and enjoined forever from asserting any interest therein; that along with said counter-claim said Fidelity Trust Company filed a bill of particulars of moneys laid out and expended to the use and benefit of said trust estate and upon which said Trust Company demanded judgment against said trust estate; that said Fidelity Trust Company in its "corporate capacity proper and as trustee" exhibited with said counter-claim the said trust agreement and trust deeds and averred that said "Fidelity Trust Company in its corporate capacity proper and as trustee" had fully performed all the conditions of said contract on its part to be performed, prior to the bringing of said suit.

47. And plaintiffs say and would show unto the court that on May 26, 1915, suit was begun in the Marion Circuit Court of Indiana against George V. Coffin as Sheriff and the

Fidelity Trust Company, as purchaser upon execution sale, to quiet plaintiffs' title as cestuis que trustents to the Marion County lands of said trust estate as against the cloud thereon placed by defendants in making said sale of said land under the decree of the Hamilton Circuit Court in said Cause Number 16,338 in the foreclosure of said trust deed as a mortgage; that said suit was in no respect whatsoever an action on said trust agreement as a contract then and there remaining executory in the interest and behalf of said defendants; that said cause in said Marion Circuit Court was Number 25,260 and by that number it is [Printed Transcript page 32] hereinafter mentioned; [fol. 67] that on June 23, 1917, a new party was introduced in said Cause Number 25,260, viz; The Fidelity Trust Company as Trustee; that this appearance was the first appearance of said Trust Company as Trustee in the many years embraced within the period of this litigation; that said appearance embraced new counsel in the person of Charles E. Cox who had been a member of the Supreme Court of Indiana at the time of the rendition of the opinion and judgment of said Supreme Court in said cause; that at the incoming of said Fidelity Trust Company as Trustee it began its action with a complaint and summons against these petitioners; that said action sounded in tort; that in said complaint, denominated a cross-complaint, it was averred that these petitioners unlawfully and without right were claiming to have an interest in said real estate; that said Trustee was the owner in fee simple of said real estate by purchase from these petitioners that said purchase was absolute and unconditional; that said claim of these petitioners was an unlawful cloud upon the title of said Trustee in and to said real estate which cloud should be removed by the court and that these petitioners should be restrained and enjoined forever from asserting any interest whatsoever in and to said real estate; that upon the hearing and trial on said cross-complaint it was considered and adjudged by said Marion Circuit Court that said cross-complaint should be and it was sustained and the prayer thereof granted and it was further considered and adjudged that these petitioners were claiming an interest in said real estate and that said claim was [fol. 68] unlawful and without right, and that said trustee

was the owner in fee simple of said real estate by purchase from these petitioners and that said purchase was absolute and unconditional, and that said claim of these petitioners was an unlawful cloud upon the title of said trustee in and to said real estate which cloud should be removed by the court and that these petitioners should be and they were restrained and enjoined forever from asserting any interest whatsoever in and to said real estate and judgment finally was awarded against these petitioners for the cost of said suit; that these petitioners duly prosecuted their appeal from said judgment to the Supreme Court of Indiana and the same is now pending on said appeal; that during all the time embraced in said proceedings in said Marion Circuit Court Louis B. Ewbank was the judge of said Marion Circuit Court and he is the same Louis B. Ewbank who is now a member of the Supreme Court of Indiana; that said proceedings and judgment of said Marion Circuit Court on said cross-complaint are wholly void for the reasons that (1) at that time the jurisdiction of the parties and the subject matter of said cause was in the Hamilton Circuit Court of Indiana and that such jurisdiction was sole and exclusive; (2) that said proceedings and judgment were in contravention of the opinion and mandate of the Supreme Court of Indiana in said cause; (3) because of a disqualifying interest of the Judge of said Marion Circuit Court which interest and the circumstances of its discovery are hereinafter more particularly set forth; that in and by said proceedings and judgment of said Marion Circuit Court the property of these [Printed Transcript Page 83] petitioners was taken without due process [fol. 69] of law and they were denied the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

48. And plaintiffs say and would show unto the court that in and by said second amended counter claim as supplemented said "Fidelity Trust Company in its corporate capacity proper and as trustee" pleaded many falsehoods including that (1) in and by said trust agreement and deeds these petitioners had parted with all their interest in the real estate of said trust estate in Hamilton County; (2) that the claim of these petitioners to an interest in said real estate was unlawful and without

right; (3) that said counter claimant had duly performed all the conditions of said contract on the part of said counter claimant to be performed; (4) that said counter claimant was entitled to any of the relief therein sought; that each and all said falsehoods were wholly without foundation in fact and in law except as said Amended Act of March 5, 1915, undertook and pretended to authorize the pleader to substitute in a pleading his own conclusions in the place and stead of facts recited in the contract at issue; that upon the incoming of said second amended counter claim as supplemented, these petitioners seeking to get the truth before the Court and to expunge false issues from the case, challenged said second amended counter claim as supplemented, (1) with motions to strike out; (2) with motions to make more specific; (3) with demurrers and (4) with answers but that each and all said challenges were overruled and denied; that the substance and effect of said respective challenges are hereinafter set forth to-wit: [fol. 70] On August 4, 1917, the plaintiffs severally moved "the court for an order to require the defendant, Fidelity Trust Company, to make more certain and specific as to each of the several particulars hereinafter respectively enumerated, its second amended counter-claim * * * to-wit:

"First. If it be true, as said counter-claim says it is true, that the defendant 'has fully and duly performed all of the conditions on its part to be by it performed,' then state the facts which cause or excuse, as the case may be, the delay on your part in closing up the affairs of said trust, during the time of which delay interest charges have accumulated against said trust estate, you say, in the aggregate sum to-wit, Ten Thousand Dollars (\$10,000.00).

"Second. State the facts which cause, or excuse as the case may be, your failure to apply the proceeds of any sale or sales of said real estate made pursuant to said trust agreement as follows, to-wit: (1) To the payment of any mortgage, or other valid lien, charge, adverse interest or incumbrance upon and against said real estate or any part of the real estate herein described, which may be prior and superior and adverse to the interest of the Fidelity Trust Company; (2) To the payment of the money advanced by second party to first parties or paid

to the use and benefit of first parties as in said trust agreement authorized and provided; (3) To the payment of moneys obtained by said second party from any bank or banks to the use and benefit of said Dora E. Rooker upon her note as in said trust [Printed Transcript Page 34] agreement authorized and provided; (4) To the payment to said Dora E. Rooker, her [fol. 71] heirs, executors, administrators and assigns the rest and residue remaining of any money arising from the sale of said real estate.

"Third. State the facts which cause or excuse as the case may be, the maturity of the debt which you charge against the plaintiffs.

"Fourth. State the date on which matured, if at all, the debt which you charge against the plaintiffs.

"Fifth. State the facts which constitute the duty and necessity, if any, on your part to have employed attorneys, viz: Mr. Henry Seyfried and Messrs. Kane and Kane, on the occasion when and for the service in which they were so employed.

"Sixth. If it be not in fact true, as stated by you to be true, that you have fully and duly performed all of the conditions of said trust agreement on your part to be performed, then state the facts, if any, in the conduct, action, or behavior of these plaintiffs or either of them, which constitute the cause, or excuse, as the case may be, the failure on your part to carry out and perform the conditions of said trust agreement on your part to be performed.

"Seventh. If it be not in fact true, as stated by you to be true, that you have fully and duly performed all the conditions of said trust agreement on your part to be performed, and if such failure on your part be not due to the conduct, action, or behavior of these plaintiffs or either of them, then state the facts which constitute your failure to carry out and perform the conditions of said trust agreement on your part to be performed.

[fol. 72] "Eighth. As to the alleged interest designated in said counter-claim as the American Central Life Insurance Company mortgage, state the fact or facts which constitute your right to have acquired said mortgage by purchase and assignment and

your right now to assert said mortgage interest as one hostile and adverse to your said interests and duty as trustee under and by virtue of said trust agreement, or, in the alternative, if said mortgage was by you acquired as an act of repudiation or in furtherance of an act of repudiation on your part of said trust agreement, then state such, all such facts as an alternative showing, all to the end that these plaintiffs may be advised whether said mortgage is pleaded as a fact within the terms of said trust or as a fact hostile and adverse to said trust."

On October 23, 1917, the plaintiffs severally moved the court for an order to strike from the files the joint second amended counter-claim of the Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as trustee of the estate of Dora E. Rooker. The substance of this motion was to the effect following:

"That said joint second amended counter-claim is vague, indefinite and uncertain and tenders no issue; that in the nature of the action said counter-claim should proceed upon either (1) the single and definite theory of an accounting founded upon the full and complete performance by said defendants jointly of the contract evidenced by the written instruments bearing date October 11, 1909, constituting the so-called trust [fol 73] agreement, purporting to have been executed by certain of the parties hereto, viz.: these plaintiffs and [Printed Transcript Page 35] said trustee, or (2) upon the single and definite theory of a quantum meruit with valuation as fixed by the said trust agreement and founded upon the partial and incomplete performance by said defendants jointly of the so-called trust agreement with such statement of facts as should excuse complete performance of said so-called trust agreement, or (3) upon the single and definite theory of a quantum valebat founded upon acts done by the said defendants jointly to the credit, use, benefit and advantage of the said trust estate in the aggregate exceeding in value the damages suffered and sustained by the said trust estate because of any failure, omission, or wrong done by the said defendants to the damage of said trust estate, and which said excess in value of benefits over damages the said trust estate has accepted, retained and appropriated to its own use, benefit and advantage; that said joint second

amended counter-claim avers facts inconsistent with and contradictory of the statement therein, 'that said cross-complainant has fully and duly performed all of the conditions on its part to be by it performed,' and that because of such inconsistencies and contradictions, the said averment is nullified and destroyed, to-wit, the averment, 'that said cross-complainant has fully and duly performed all of the conditions on its part to be by it performed,' and that in the premises there is no issue tendered by the said second amended counter-claim that the said defendants are entitled to any recovery whatever upon and by virtue of said pleading as upon an issue tendering the performance [fol. 74] by said defendants of any contract fixing any liability whatsoever against these plaintiffs in favor of said defendants upon said counter-claim; that said joint second counter-claim avers no fact in excuse of the failure on defendants' part to make full and complete performance of said so-called trust agreement and by reason of which excuse for the full and complete performance of said so-called trust agreement said defendants are entitled herein to employ said trust agreement to fix the value, as upon a quantum meruit, of any act or acts done or claimed to have been done by said defendant under and by virtue of said trust agreement and these plaintiffs say that in the premises there is no issue tendered by said joint second amended counter-claim that the said defendants are entitled to any recovery whatsoever, as upon an issue the quantum meruit, against these plaintiffs in favor of said defendants upon said counter-claim; that said joint second amended counter-claim avers no fact founded upon acts done by said defendants jointly to the credit, use, benefit and advantage of the said trust estate in the aggregate exceeding in value the damages suffered and sustained by the said trust estate because of any failure, omission, or wrong done by the said defendants to the damage of said trust estate and which said excess in value of benefits over damages the said estate has accepted, retained and appropriated to its own use, benefit and advantage; that upon the facts in the premises the said joint second amended counter claim tenders no issue whatsoever in favor of said defendants and is useless and can accomplish no proper and lawful purpose

in this cause, and is needless encumbrance of the record and [fol. 75] should be stricken from the files herein." [Printed Transcript Page 36]

Demurrers were filed by plaintiffs to each paragraph of the second amended counter-claim as supplemented, for want of facts sufficient to constitute a cause of action in favor of the defendants and connected with the cause of action in suit herein and with their demurrer plaintiffs filed a memorandum of points as required by the Indiana practice act. The substance of the demurrer and points was as follows:

"Plaintiffs demur to each paragraph of second amended counter-claim as supplemented for the reason the same does not state facts sufficient to constitute a cause of action connected with the cause of action in suit herein. For their memorandum plaintiffs state these points, viz:

"1. The second amended counter-claim as supplemented is joint as to the plaintiffs (defendants) and must be good as to both or bad as to both.

"There is no privity of contract as between the plaintiffs and either of the defendants except the defendant as trustee.

"It contravenes the mandate of the Supreme Court in this cause to admit issues in this cause which are outside of those within the terms and effect of the trust agreement and the notice of repudiation thereof and the suit for an accounting as between the plaintiffs and the trustee. If the trustee borrowed money from Fidelity Trust Company, or any other bank or [fol. 76] banker whomsoever such transaction would not under the trust agreement, constitute or create a privity between such bank or banker and these plaintiffs.

"2. Steps taken by the Fidelity Trust Company in its corporate capacity proper to fortify the title it sought to acquire and did acquire unlawfully were acts done in aid of its own wrong and have no place in an accounting between the cestuis que trustents and the trustee.

"3. The trustee and its co-plaintiff having elected to repudiate the trust agreement and having thereby caused the cestuis que trustents to change their situation greatly to their loss and

damage will not be heard to declare that such act of repudiation was void and that such election to repudiate is to be disregarded.

"The trustee having elected, with the aid and participation of its co-plaintiff to repudiate the trust and having thereafter caused the plaintiffs to suffer loss and damage and to change their situation could not in any court ask that said trust agreement be reinstated except upon a tender that equity be done these plaintiffs. There is no tender of equity."

On October 23, 1917, your petitioners filed their answer in several paragraphs to said counter-claim in said Hamilton Circuit Court.

In the first of these answers these petitioners admitted the execution of said trust agreement and the two concurrent deeds and joined issue with a general denial as to all other averments of the counter-claim. [Printed Transcript Page 37] [fol. 77] The second answer was a plea of non est factum to meet a variance between certain orders as pleaded. At the trial this pleading was corrected.

The third paragraph was omitted.

The fourth paragraph was payment.

The fifth paragraph was partial and was directed to the items of fees, commissions and interest and as to these items the answer tendered the issue of failure of consideration upon these specifications, to-wit:

"A. Said defendant as trustee promised and agreed in consideration of said compensation to furnish the moneys and means with which to complete said dwelling house and out-buildings appurtenant thereto, and other necessary and proper structures, and to equip the same with modern utilities and conveniences, all to be duly completed and installed, and to furnish the moneys and means necessary to the true and better and complete performance of said contracts of trust and to the successful maintenance of and care for said real estate and the business thereon conducted.

"B. Said defendant as trustee promised and agreed to obtain from other banks and bankers upon the promissory notes of said Dora E. Rooker such sum or sums of money over and above the sum said defendant trustee was to furnish out of its moneys

and means, as should be necessary to complete said dwelling house and outbuildings appurtenant thereto and other necessary and proper structures, and to equip the same with modern utilities and conveniences, all to be duly completed and installed; and to that end said defendant trustee obligated itself and it became and was its duty to protect the credit of said [fol. 78] Dora E. Rooker generally and particularly at banks.

"C. Said defendant as trustee obligated itself and it became and was its duty to protect said real estate and said trust estate against waste and to pay promptly upon the written order and direction of said Dora E. Rooker all indebtedness within the terms of said contract and against said property.

"D. That said defendant as trustee obligated itself to begin within the period of one year after the execution of said trust agreement to reduce said trust estate to cash and to administer said trust and liquidate its credits and debits in the form and manner prescribed in said contract.

"E. That said defendant as trustee obligated itself to strict fidelity to said trust estate and to the said Dora E. Rooker and William V. Rooker, all to the end that the interests of said estate would thereby be the better conserved and said trust the more prudently and advantageously administered.

"Yet notwithstanding the said duties and obligation of said defendant trustee, which it was to do and perform in consideration of and as its compensation to said Dora E. and William V. Rooker for said rates, fees, commission and charges, said defendant trustee failed, neglected and refused to furnish the moneys and means with [Printed Transcript Page 38] which to complete said dwelling house and outbuildings appurtenant thereto, and other necessary and proper structures and to equip the same with modern utilities and conveniences, the same to be duly completed and installed, and said defendant [fol. 79] trustee failed, neglected and refused to furnish the moneys and means necessary to the true and better and complete performance of said contract of trust and to the successful maintenance of and care for said real estate and the business thereon conducted.

"That said defendant trustee failed, neglected and refused to obtain money from other banks and bankers upon the promissory notes of said Dora E. Rooker and failed, neglected and refused to protect and preserve the credit at bank of said Dora E. Rooker, to the end that she might obtain such sum or sums of money over and above the sum said defendant trustee was to furnish out of its moneys and means as should be necessary to complete said dwelling house and outbuildings appurtenant thereto and other necessary and proper structures and to equip the same with modern utilities and conveniences, so that the same should be duly completed and installed; but on the contrary, said Fidelity Trust Company in its corporate capacity proper and with the knowledge and consent of said trustee unlawfully and without right set about to appropriate and convert to itself said trust estate and the better to accomplish such unlawful purpose, it set about to injure and destroy the credit at banks of said Dora E. Rooker and William V. Rooker, and to that end it persistently baffled and annoyed such banks, as the said Dora E. Rooker and William V. Rooker had theretofore satisfactorily done business with and thereby said Trust Company, with the knowledge, consent and participation of [fol. 80] said trustee, greatly impaired and wholly destroyed the credit of said Dora E. Rooker and William V. Rooker at said banks,

"That said defendant trustee wholly failed, neglected and refused to protect said real estate and said trust estate against waste, and to pay promptly upon the written order and direction of said Dora E. Rooker all indebtedness within the terms of said contract and against said property; but, on the contrary, said defendant trustee allowed taxes on said real estate to become delinquent, and allowed said property to go without insurance, and refused to pay the written orders of said Dora E. Rooker for sums justly due to claimants against said trust estate, and caused and procured said claimants to file notices of mechanic liens against said trust estate, and to sue thereon and reduce the same to judgment with attorney's fees and costs, and to assign such judgment to said Trust Company, in its said corporate capacity proper.

"That said defendant trustee wholly neglected, failed and refused to begin, within the term of one (1) year, to reduce said trust estate to cash and to liquidate said trust in the form and manner prescribed in said contract; but, on the contrary, said defendant Trust Company, trustee under the domination and control of such Trust Company in its corporate capacity proper, for the unlawful uses and purposes of said Trust Company as aforesaid, repudiated its said duties of [Printed Transcript Page 39] fidelity and trust, and gave to these plaintiffs notice [fol. 81] in writing of such repudiation, a copy of which marked 'Exhibit No. 1,' is filed with the complaint herein; that said Trust Company and said trustee tendered back said estate grossly wasted and heavily encumbered, and thereupon demanded that these plaintiffs pay forthwith in money the demands of said Trust Company as a mortgagee; that said notice of repudiation of said trust was served on these plaintiffs before the bringing of this suit.

"That by reason of the premises said defendant trustee has forfeited and waived the consideration upon which it might lawfully demand the collection of the interest, rates, commission, fees and charges mentioned in said trust agreement, and by reason thereof said compensation which it now demands is unjust, usurious and unlawful.

The sixth paragraph was partial and set forth that the counter claim sought to recover penalties imposed by law for delinquent taxes while the title to the affected real estate was in the name of the Fidelity Trust Company; that penalties arose out of negligence; that the trustee was at fault and the trust estate not liable.

The seventh paragraph was partial and pertained to penalties imposed for delinquency in the payment of interest; that the trustee was at fault and the trust estate not liable.

The eighth paragraph was partial and pertained to the contract for plumbing. It charged that the trustee had abrogated the contract for this work, to the injury of the trust estate and asked for an accounting.

[fol. 82] The ninth paragraph was partial and pertained to seed which was sown but the crop not harvested because of the wrongful act of the trustee.

The tenth paragraph was partial and pertained to the duplication of an item of five hundred and five dollars (\$505.00) indemnity furnished to a surety company on an appeal bond. The fund was applied to payment of the judgment appealed from and was thereupon charged twice—once when advanced to the surety company and again when applied on the judgment.

The eleventh paragraph was partial and applied to an item of Five Hundred Seventy-one and 21/100 Dollars (\$571.21) in the form of a judgment on a mechanics' lien. The case should not have been litigated; there was no defense; the claim was honest and due; the trustee refused to pay the claim but required that the suit be brought which added two attorneys' fees to the demand; thereupon the trustee acquired the judgment by assignment, as a speculation against the trust estate.

The twelfth paragraph was partial and pertained to office expenses and administrative items of the Trust Company which never were within the terms of the trust agreement.

The thirteenth paragraph was partial and pertained to insurance premiums paid by the Trust Company while it held the title to the property of the trust estate pursuant of sheriff's sales adversely to the trust. [Printed Transcript Page 40]

The fourteenth paragraph was partial and pertained to an [fol. 83] item of Fourteen Thousand Four Hundred Twenty-four and 50/100 Dollars (\$14,424.50) representing the value of a mortgage purchased by the Trust Company and reduced to action against Dora E. Rooker after the Trust Company had repudiated the trust and renounced the office of trustee.

The fifteenth paragraph was partial and pertained to items aggregating Eighteen Thousand Four Hundred Eighty-nine and 31/100 Dollars (\$18,489.81) which were not incurred in the administration of the trust.

On October 23, 1917, plaintiffs filed their supplemental complaint in three paragraphs further complaining in the first paragraph of said supplemental complaint of grievances which

have occurred to them since the filing of their original complaint herein; that since the bringing of this action and since the filing of the amended complaint herein, the Fidelity Trust Company in its corporate capacity proper, and the Fidelity Trust Company as trustee, wrongfully and unlawfully pursued each of the purposes and acts hereinafter more particularly set forth, and by such pursuit and acts have sought to consummate and make effective the wrongful and unlawful scheme and collusion heretofore made and entered into by and between them, whereby said Trust Company in its corporate capacity proper was designing and intending to sequester, take over, appropriate and convert as its own gain, advantage and profit the entire property and value of said trust estate of the value, to-wit, Eighty-five Thousand Dollars (\$85,000.00) to the wrongful and unlawful exclusion of these plaintiffs and all other just, lawful and proper beneficiaries of said trust estate; that in aid [fol. 84] and advancement of said scheme and collusion, said Fidelity Trust Company in its corporate capacity proper, and with the knowledge, connivance and consent of said trustee, and with the unlawful and wrongful acquiescence, aid and assistance of said trustee, declared said trust agreement of date October 11, 1909, and the said several deeds executed concurrently therewith to be a mortgage, and to that effect and in furtherance of said scheme and collusion said Fidelity Trust Company in its corporate capacity proper did on, to-wit, the 24th day of March, 1918, wrongfully and unlawfully and maliciously and without probable cause therefor declare upon said trust agreement and said several deeds executed concurrently therewith as a mortgage executed by these plaintiffs to said Fidelity Trust Company in its corporate capacity proper, and in denial of said instruments as a deed of trust executed by these plaintiffs to said Trust Company as trustee; and so declaring said Trust Company in its corporate capacity proper, did on said date file in this cause the so-called cross-complaint of said Fidelity Trust Company in its corporate capacity proper, whereby and wherein said cross-complaint asked that said trust agreement and said deeds be adjudged to be a mortgage executed by these plaintiffs to said Fidelity Trust Company in its corporate capacity proper, and in denial of said instru-

ments as a trust deed executed by these plaintiffs to said Trust Company as trustee, and further asking that [Printed Transcript Page 41] upon such adjudication of said instruments to be a mortgage that said mortgage be adjudged to have been defaulted by these plaintiffs and then and there subject to foreclosure [fol. 85] closure as a mortgage, and that the same be foreclosed as mortgages are foreclosed, and that said premises therein described, the same being the said trust estate, be sold upon a certified copy of such decree as other lands are sold on execution, and cross complainants further prayed judgment for its costs and for all other proper relief in the premises.

"That thereafter such proceedings were had in said cause as that on, to-wit, the 5th day of November, 1913, said Fidelity Trust Company filed its amended cross-complaint in said cause; that said amended cross-complaint was both an amended and a supplemental cross-complaint, and as a supplemental pleading it brought new matter into issue in this cause. That in said supplemental and amended cross-complaint, said Trust Company in its corporate capacity proper declared upon each of the following several items of payment, each as being outside of and beyond the terms of any trust agreement and particularly of the said trust agreement executed by and between these plaintiffs, and said Fidelity Trust Company as trustee, to-wit: (Here follows specification of items.)

"That a bill of particulars was attached to and filed with said amended cross-complaint purporting to show specifically each and every of the said items declared upon in said cross-complaint as having been paid out by the said Fidelity Trust Company in its corporate capacity proper, and as constituting and comprising the consideration of the said mortgage to secure the said mortgage loan purporting to have been made by the said Fidelity Trust Company in its corporate capacity proper [fol. 86] to said Dora E. Rooker and to said Dora E. Rooker and William V. Rooker on their respective lands in Hamilton County and in Marion County, all in the State of Indiana. That said bill of particulars included each of the items specified in the exhibits following, to wit: (Here follows specifications of items.)

"That upon said amended cross complaint said Fidelity Trust Company in its corporate capacity proper caused and required issue to be joined in said cause, and such proceedings thereafter to be had as resulted in judgment and decree of this court adjudging said trust agreement and said deed executed concurrently therewith to be a mortgage, and adjudging said mortgage to be in default and adjudging that said mortgage be foreclosed, and in decreeing the foreclosure of said mortgage and in ordering and directing that said real estate described in said trust agreement and in the deeds executed concurrently therewith be sold upon certified copy of such decree as other lands are sold on execution; that thereafter said Fidelity Trust Company in its corporate capacity proper, caused and procured certified copies of said decree to be issued respectively to the Sheriff of Marion County and to the Sheriff of Hamilton County, and caused and procured said Sheriffs respectively before advertising and selling said affected real estate in each of said Counties to cause the same to be appraised; that said Fidelity Trust Company in its corporate capacity [Printed Transcript Page 42] proper bid in said real estate at said respective sales and thereupon caused and procured said respective Sheriffs to issue to said Fidelity Trust Company in [fol. 87] its corporate capacity proper the Sheriff's certificate of purchase of said respective tracts of land in said respective Counties; that upon the expiration of the year for redemption of said sales said Fidelity Trust Company in its corporate capacity proper caused and procured said respective Sheriffs to issue their several Sheriff's deeds conveying said land so sold as aforesaid to said Fidelity Trust Company in its corporate capacity proper; that said proceedings throughout were prosecuted maliciously and without probable cause by said Fidelity Trust Company in its corporate capacity proper. That such prosecution of said action caused and required the said Dora E. Rooker and William V. Rooker to lay out and expend a large sum of money, to-wit, Fifteen Thousand Dollars (\$15,000.00) in and about the defense of said action on said cross-complaint; that said certificates of said Sheriffs included the prosecution of and appeal to the Supreme Court of Indiana from said judgment of said Hamilton Circuit Court; that in and by

the opinion and judgment of said Supreme Court the judgment of the Hamilton Circuit Court in the affected premises was wholly reversed and set aside and held for naught, and said trust agreement was adjudged to be as it purports to be, a trust agreement and not a mortgage; that by reason of the said malicious prosecution of said action and without probable cause therefor the said Dora E. Rooker and William V. Rooker have been damaged as upon the facts stated in this paragraph of supplemental complaint, in the sum of Fifteen Thousand Dollars (\$15,000.00), for which sum they demanded judgment upon this paragraph of supplemental complaint.

[fol. 88] Dora E. Rooker and William V. Rooker, further complaining of grievances which had occurred to them since the filing of their original complaint herein, and for second paragraph of supplemental complaint said, that plaintiffs now here reaffirmed each and every allegation in their original complaint and in their amended complaint herein as of the several respective dates of said several respective pleadings; that since the bringing of this action the Fidelity Trust Company in its corporate capacity proper, and the Fidelity Trust Company as trustee, had wrongfully and unlawfully pursued, and by such pursuit have sought to consummate and make effective, a wrongful and unlawful scheme and collusion heretofore made and entered into by and between them, but at a particular time at which these plaintiffs being without information were unable to state, whereby said Trust Company in its corporate capacity proper and for itself sequestered, took over, appropriated and converted as its own gain, advantage and profit the entire property and value of said trust estate to the wrongful and unlawful exclusion of these plaintiffs and of all other just, lawful and proper beneficiaries of said trust estate; that in aid and advancement of said scheme and collusion said Fidelity Trust Company in its corporate capacity proper, and with the knowledge and consent of said trustee and with the wrongful and unlawful acquiescence, aid and assistance of said [Printed Transcript Page 43] trustee did declare said trust agreement of date October 11, 1909, and the said several deeds executed concurrently therewith to be a mortgage, and to that [fol. 89] effect and in furtherance of said scheme and collusion

they did confederate and conspire together to cause and procure said trust agreement to be adjudged in said action to be a mortgage, and as such mortgage to be foreclosed, and upon such foreclosure to order that said real estate described in said deeds of trust be sold as other lands are sold on execution; that in and by said proceedings said Fidelity Trust Company in its corporate capacity proper wrongfully and unlawfully obtained to itself the legal title in fee simple to said real estate; that while the said title to said real estate was in the said Fidelity Trust Company in its corporate capacity proper, said Fidelity Trust Company caused and committed waste to said real estate and wrongfully and unlawfully permitted waste to be committed on said real estate to such extent and manner as that a scale house, granary and crib building on said Marion County lands was wholly destroyed to the damage of said lands, Four Thousand Dollars (\$4,000.00); that the roof on the horse barn on said Marion County real estate was injured and impaired to such extent as to require a new roof to be placed thereon at a cost and expense of Five Hundred Dollars (\$500.00); that the buildings on said Marion County land were permitted to go without painting or other protection against the elements, to the injury of said buildings and said trust estate in the sum of Five Hundred Dollars (\$500.00); that fifteen hundred (1,500) rods of fencing on said Marion County land were permitted to waste and be destroyed to the damage of said real estate, Three Thousand Dollars (\$3,000.00); that on said Hamilton County lands three [fol. 90] thousand (3,000) rods of fencing were permitted to waste and become destroyed to the damage of these plaintiffs and said trust estate in the sum of Six Thousand Dollars (\$6,000.00); that the barns and other buildings on said Hamilton County lands were permitted to waste and be injured by the elements to the damage of Three Thousand Dollars (\$3,000.00). That in all said trust estate was by reason of the said unlawful and wrongful conduct of the Fidelity Trust Company in its corporate capacity proper and of said Fidelity Trust Company as trustee conniving with and aiding and abetting its said co-defendant, wasted and damaged in the sum of Seventeen Thousand Dollars (\$17,000.00).

"Wherefore, on this paragraph of complaint plaintiffs demand judgment in the further sum of Seventeen Thousand Dollars (\$17,000.00).

Dora E. Rooker and William V. Rooker, plaintiffs, further complaining of grievances which had occurred to them since the filing of their original complaint herein, and for their third paragraph of supplemental complaint said, that plaintiffs now here reaffirmed each and every allegation contained in their original complaint and in their amended complaint in this cause as of the several respective dates of said several respective pleadings. That after the execution of said trust agreement and said deeds which were executed concurrently therewith by and between these plaintiffs and said Fidelity Trust Company as trustee but at a particular time to these plaintiffs [Printed Transcript Page 44] unknown, and for that reason they are here unable to give the date thereof, said Fidelity Trust Company in its corporate capacity proper and said Fidelity Trust Company as trustee, wrongfully and unlawfully and with the purpose and intent that said Fidelity Trust Company in its corporate capacity proper might and should take over to itself as its own, made and entered into as between themselves a scheme and collusion to destroy the credit and capacity of these plaintiffs to protect themselves in said trust estate against any unlawful act and purpose on the part of said defendants and to that purpose and effect and in carrying out said confederacy and conspiracy between them, said defendants agreed that said Fidelity Trust Company should not furnish the money with which to maintain said property and to carry on the business conducted thereon. That in furtherance of said conspiracy and confederacy said defendants did not nor did either of them furnish the necessary capital with which to maintain said farms and to operate them and to carry on the business conducted thereon; that said trust estate then and there consisted of a large acreage of agriculture lands, to-wit, three hundred fifty (350) acres. That by reason of the said wrongful and unlawful acts of the defendants in withholding the capital necessary to operate said lands and in declining and refusing to carry out said trust agreement, said lands were permitted to go uncultivated and to be and remain idle to such

extent as the earning value thereof was impaired and destroyed to the extent of an average of Ten Dollars (\$10.00) per acre on each acre of said land, and for a period, to-wit, of seven (7) years, and in the aggregate, to-wit, Twenty-Four Thousand Five Hundred Dollars (\$24,500.00).

[fol. 92] Wherefore, plaintiffs on this paragraph of supplemental complaint demanded judgment in the sum of Twenty-four Thousand Five Hundred Dollars (\$24,500.00).

49. And plaintiffs say and would show unto the court that on the 29th day of May, 1918, the defendants filed their so-called joint supplemental second amended counter-claim in two paragraphs. The first of these averred that since the filing of the second amended counter-claim additional payments had been made, which were specified and for which judgment was asked. The second paragraph was an attempted retraction of the act of repudiation of the trust agreement and brought into the record in the case what may be called the Ewbank Judgment of the Marion Circuit Court. This paragraph was in substance to the effect following:

"For second and further paragraph by way of counter-claim, defendant says that while the plaintiffs herein, since the commencement of their original action and since the filing of the last counter-claim of this defendant herein have contended before this court, that the deeds of conveyance and the memorandum of trust executed contemporaneously therewith constitute a trust estate and vest the title to the lands in the defendant Fidelity Trust Company as trustee, with the power vested in this defendant as trustee, to sell the same according to the provisions of the trust, and have complained because the lands were not sold, yet notwithstanding that fact they [Printed Transcript Page 45] have ever since the filing of the defendant's second amended counter-claim outside of the court, openly claimed and asserted a proprietary interest in [fol. 93] said lands and asserted title thereto and denied this defendant's right, as trustee, to sell and convey the same pursuant to and for the purposes enumerated in said memorandum of trust; * * * that said plaintiffs after the rendition of judgment in this court on the original complaint and cross-

complaint of the parties, namely, on May 26, 1916, filed against this defendant in the Marion County Circuit Court their complaint in statutory form to quiet the title in them to said Marion County lands; that on June 4, 1916, they filed a second paragraph of complaint in said cause, followed by other pleadings on the part of both parties; that after said original cause referred to was reversed in the Supreme Court, said plaintiffs still pursued and pressed said action in the Marion County Circuit Court to quiet their title, whereupon this defendant on June 23, 1917, filed its cross-complaint, setting up the title, as trustee, to said Marion County lands under the deed of trust and memorandum of trust set forth in the pleadings in this cause, and praying for an injunction enjoining the plaintiffs in said action, Dora E. Rooker and William V. Rooker, from denying or disputing this defendant's title, as trustee, to said lands, and from denying, disputing, obstructing or interfering with the sale of said lands by said trustee under and pursuant to its power of sale; that afterward, on October 4, 1917, said cause was submitted to the Marion County Circuit Court for trial finding and judgment, and a special finding of facts and conclusions of law having been requested by the plaintiffs [fol. 94] in this action, the court, on December 4, 1917, filed its special findings and conclusions of law, and thereafter on February 5, 1918, entered judgment upon the special findings and conclusions of law, by which judgment said court adjudged the sheriff's sale of said Marion County real estate made under the decree of foreclosure rendered on the original judgment in this cause null and void and of no effect, and further adjudged that this defendant, Fidelity Trust Company, as trustee, under and pursuant to the deed of trust referred to, as such trustee, is the owner in fee simple, as trustee, of said Marion County lands, with full power to sell and convey the same in accordance with the provisions of said deed of trust by which it was conveyed to this defendant, as trustee, by the plaintiffs herein, and that all claims of the plaintiffs in said action were unfounded, and that the title thereto of this defendant, Fidelity Trust Company, as trustee, under said deed of trust be quieted and forever set at rest, and that the plaintiffs, Dora E. Rooker and William V. Rooker, be perpetually an-

joined from denying or disputing the title of said Fidelity Trust Company, as trustee, to said lands, and from denying, disputing, obstructing or interfering with the sale of said lands by said trustee, under and pursuant to its power of sale; that after the rendition of said judgment and the granting of said injunction, the plaintiffs prayed an appeal to the Supreme Court, and sixty (60) days' time was given to file bills of exceptions, and the appeal prayed for granted upon filing bond in the sum of Five Thousand Dollars (\$5,000.00); that no bill of exceptions or bond was filed in said [Printed Transcript Page 46] cause, but on May 15, 1918, the plaintiffs, Dora E. Rooker and William [fol. 95] V. Rooker, ordered a transcript for appeal to the Supreme Court, all for the purpose of hindering and obstructing the sale of said Marion County lands by this defendant pursuant to and under the provisions of the trust created by the plaintiffs.

"And this defendant now further shows to the court that it has given notices of the sale of said Marion County lands pursuant to the provisions of and in accordance with the terms of said agreement of trust referred to, by serving a ninety-day notice in writing upon the plaintiffs, Dora E. Rooker and William V. Rooker, and then publicly advertising said Marion County lands for sale in the Indianapolis News and Indianapolis Star, four (4) weeks successively, once a week; that while several inquiries were made by prospective purchasers, this defendant was unable to secure the purchaser on account of widespread rumors afloat in the community that this defendant, as trustee, would be unable to give peaceful possession to a purchaser of said lands, which rumors to that effect are the result of the conduct of the plaintiffs herein; that the plaintiffs still retain possession of all said lands and enjoy the profits thereof, without paying any obligations, charges or even taxes, and that said Marion County lands are incumbered with a mortgage given to secure a loan of Six Thousand Dollars (\$6,000.00) made by the plaintiffs herein prior to the conveyance of said lands to this defendant, as trustee, and that said mortgage, with several years' interest thereon, remain unpaid, and that said Marion County lands will not sell by far for enough to pay off said mortgage and the moneys advanced by this defendant, and

[fol. 96] that it will be necessary to sell both the Marion County and the Hamilton County lands in order to pay and discharge the amounts advanced as hereinbefore shown; that the plaintiffs herein are in like manner also claiming an interest in said Hamilton County lands and are asserting and attempting to assert and claim title to the same, which said interest so claimed by plaintiffs herein is adverse to this defendant's claim and title to said real estate as trustee, under and pursuant to the deed of trust and memorandum of trust executed by the plaintiffs, and that the claim of said plaintiffs is unfounded and without right, and is a cloud upon this defendant's title, as trustee, to said real estate, and that this defendant, as trustee, is the owner of and entitled to have its title as trustee quieted and forever set at rest in and to said lands situate in Hamilton County, Indiana, and described as follows: (Here follows description by metes and bounds of two hundred seventy-five (275) acres of land, being the Hamilton County real estate described in the trust deed of October 11, 1909.)

"And this defendant further shows the court that the plaintiffs herein will interfere with, hinder and obstruct any attempted sale of said Hamilton County lands by this defendant, as trustee, although such sale be attempted to be made under and pursuant to the powers and in strict compliance with the provisions contained in said deed of trust and memorandum of trust, and that unless they be enjoined from interfering with, hindering and obstructing such sale, this defendant, as trustee, will be powerless to exercise and discharge the power of sale conferred upon it as such trustee. In consideration [Printed Transcript Page 47] thereof, this defendant says that the sales of the [fol. 97] lands under and in pursuance of the powers and in compliance with the provisions of said trust, should be made by this defendant, as trustee, under the order and guidance of this court, and that without said aid and assistance of the court by reason of the plaintiffs' action as aforesaid, no advantageous sales can be made, and further that if a sale is made the plaintiffs will refuse to give possession of the lands unless this court by its order grants its assistance.

"Wherefore, this defendant prays the court that its title in and to said Hamilton County lands may be forever quieted

and that upon judgment being rendered herein the court also enjoin the plaintiffs from denying or disputing the title of this defendant, as trustee, to said Hamilton County lands, and from denying, disputing, obstructing or interfering with the sale of said lands by said trustee under and pursuant to its power of sale contained in the deed and memorandum of trust executed by the plaintiffs herein to this defendant as such trustee, and that the court enter its order and decree directing the sale of said Marion County and Hamilton County lands, and for all other appropriate equitable relief as to the court may seem just and necessary." (Here followed specifications of vouchers alleged to have been paid.)

50. And plaintiffs say and would show unto the court that at the trial of said cause these plaintiffs offered and read in evidence, along with other evidence produced by them, each of the following records, papers and documents, to wit:

[fol. 98] (1) The trust agreement hereinbefore recited as having been executed on October 11, 1909 by and between these plaintiffs and said Fidelity Trust Company; (2) the trust deed hereinbefore recited as having been executed on October 11, 1909 by these plaintiffs conveying upon trust said Marion County real estate to the Fidelity Trust Company as trustee; (3) the trust deed hereinbefore recited as having been executed on October 11, 1909 by these plaintiffs conveying upon trust said Hamilton County real estate to the Fidelity Trust Company as trustee; (4) the written notice of repudiation of the trust and renunciation of the office of trustee, hereinbefore recited, served on these plaintiffs by the Fidelity Trust Company and the Fidelity Trust Company as trustee on October 28, 1912; (5) the complaint to foreclose said American Central Life Insurance Company Mortgage on the Hamilton County real estate which complaint was filed on May 26, 1914, in the Hamilton Circuit Court of Indiana as Cause Number 16,755 wherein the Fidelity Trust Company was plaintiff and Dora E. Rooker and William V. Rooker were defendants; (6) the Sheriff's deed on decretal sale conveying to the Fidelity Trust Company as purchaser the Marion County land of the trust estate for the sum of Four Thousand Dollars (\$4,000.00), said deed bearing date June 8, 1915; (7) the Sheriff's deed on decretal sale conveying to the

Fidelity Trust Company as purchaser the Hamilton County lands of the trust estate for the sum of Twenty Thousand Eight Hundred and Sixty-four Dollars and Fourteen Cents (\$20,864.-14), said deed bearing date September 28, 1915; that each [fol. 99] of said Sheriff's deeds was in the statutory form and was [Printed Transcript Page 48] admitted in evidence without objection; that in said trial these plaintiffs made objections to the admission of items in evidence which were not in accord with the complaint and the supplemental complaint of these plaintiffs and their answers to the defendants' counter-claim, and to each adverse ruling these plaintiffs excepted in the time, form and manner provided by law; that upon the trial of said cause the court made a special finding of the facts; that upon said special finding of facts these plaintiffs presented to the court their motion for judgment in favor of plaintiffs, which motion was overruled by the court and exception to the ruling reserved by plaintiffs; that upon said special finding of facts the court stated its conclusions of law to which plaintiffs excepted.

51. And plaintiffs say and would show unto the court that thereafter on December 21, 1918, the Circuit Court rendered its second judgment herein, which in substance was as follows, to wit:

"Come now the parties and the court having found the facts specially and stated its conclusions of law thereon, now renders judgment accordingly.

"It is therefore considered, ordered, adjudged and decreed by the court that the plaintiffs take nothing in this action except as hereinafter provided in the disposition of the proceeds of the sale of the lands comprising the trust estate hereinafter described.

"It is further considered, ordered, adjudged and decreed that the defendant and cross-complainant Fidelity Trust Company has not mismanaged, repudiated or abandoned its trust, but [fol. 100] has faithfully performed its duties as trustee under the deeds and trust agreement set out in the pleadings and special findings, by advancing large sums of money for improvements on the lands of said trust estate and to free and preserve said estate from dissipation through liens and incum-

brances, by taking proper steps under said instruments to sell the same and otherwise and now holds the legal title to said lands as trustee for the sole purpose of completing its duties and obligations, as such trustee, by making sale of the same and by making distribution of the proceeds according to the terms of said deeds and trust agreement and not otherwise, and in no other capacity. That said defendant and cross-complainant Fidelity Trust Company, as such trustee, holds the legal title to said lands and the appurtenances thereunto belonging, and is fully and lawfully empowered and under the duty to sell and convey said lands, by deeds of warranty of the fee simple title, and give full possession of the same which lands are described as follows: (Here followed a description of the three hundred fifty-five (355) acres of land comprising the trust estate, there being two hundred seventy-five (275) acres in Hamilton County and eighty (80) acres in Marion County.)

"It is further considered, ordered, adjudged and decreed that said Fidelity Trust Company, trustee, is entitled to judgment on its account against said trust estate to be paid out of the proceeds of the sales of the lands so held in trust by it, as hereinbefore provided, in the sum of Fifty Thousand Six Hundred Ninety-seven Dollars (\$50,697.00). [Printed Transcript page 49]

"It is further considered, ordered, adjudged and decreed [fol. 101] that said plaintiffs, Dora E. Rooker and William V. Rooker, by said deed of conveyance and trust agreement have parted with all their title to said real estate and appurtenances thereunto belonging, and the right to the possession thereof and the use, rents and profits thereof, and have no interest therein other than in such proceeds of the sale thereof as may remain to be distributed to the said Dora E. Rooker under this judgment and said trust agreement. That any other interest in or control over said lands than said interest in the proceeds, aforesaid, heretofore and now being asserted by said plaintiffs, adverse to the title of said trustee, is wrongful, without right and unfounded and obstructive of the completion of the execution of said trust by said trustee, and said Dora E. Rooker and William V. Rooker be and they are, each and both, hereby perpetually enjoined from denying or disputing the said

title of the said Fidelity Trust Company, as trustee, to said lands above described and its right to the possession, use and rents and profits thereof, and from denying, disputing, obstructing or in any manner interfering with the sale of said lands by said trustee under and pursuant to its power of sale, conferred by said deeds and trust agreement, and from refusing to give possession and from in any manner interfering with, disputing or obstructing said trustee, or any purchaser or purchasers in giving possession or in taking possession when sale shall have been made of said lands, as aforesaid.

[fol. 102] "It is further considered, ordered, adjudged and decreed that said Fidelity Trust Company as such trustee proceed under the power and according to the terms of said deeds and trust agreement and make and complete sale of said above described lands, convey the same by warranty deeds in fee simple and put the purchaser or purchasers thereof in possession; that said Marion County lands having failed to sell for the sum of Eighteen Thousand Dollars (\$18,000.00) in the first year after the execution of said deeds and trust agreement or thereafter, said trustee having given the written notice to said plaintiffs and the notice by public advertisement provided for by said trust agreement and deeds, shall proceed to sell and convey said Marion County lands above described, forthwith for whatever sum they may bring, using diligence to procure the highest and best price obtainable therefor; that if said Marion County lands do not sell for lack of a bid, then said trustee shall, after giving said plaintiffs ninety (90) days' notice in writing of their intention to do so, sell and convey said Hamilton County lands for whatever sum they will bring over and above the upset price of Sixty-Five Thousand Dollars (\$65,000.00); that if said Hamilton County lands do not sell for said sum of Sixty-five Thousand Dollars (\$65,000.00), for lack of a bid for that sum, then said trustee, after ninety (90) days' notice in writing to the plaintiffs of their intention to do so, shall sell said Marion County lands at public auction for whatever sum and price they may bring, using diligence to procure the highest and best price obtainable therefor; that if [fol. 103] upon any sale of the Marion County lands under this decree they do not fetch enough to pay the moneys and perform

the obligations against said [Printed Transcript page 50] trust estate, in this action found to exist and to be due, then said trustee shall, after giving thirty (30) days' notice to said plaintiffs of their intention so to do, proceed to sell, and sell and convey said Hamilton County lands for whatever sum and price they will bring, using diligence to procure the highest and best bid therefor. That any sale or sales made under this decree shall be forthwith submitted to this court for approval or disapproval.

"It is further considered, ordered, adjudged and decreed that when the sale or sales herein provided for have been made said trustee shall apply the proceeds of said sales as follows:

"1. To the payment of the costs of this action.

"2. To the payment of any mortgage or other valid liens, charge, adverse interest or incumbrance upon and against said real estate or any part of any said real estate above described, which may be prior and superior and adverse to the interest of said Fidelity Trust Company, Trustee.

"3. To the payment of said Fidelity Trust Company of the judgment on account herein decreed in the sum of Fifty Thousand Six Hundred Ninety-Seven Dollars (\$50,697.00).

"4. To the reimbursement of said Fidelity Trust Company any sum or sums which may accrue to it in the execution of said trust, after the date of this judgment and decree.

"5. The rest and residue of any money derived from said [fol. 104] sale or sales shall be paid to the said Dora E. Rooker, her heirs, executors, administrators and assigns."

52. And plaintiffs say and would show unto the court that on January 2, 1919, the plaintiffs filed their respective motions to modify the judgment, said motions being in substance as follows, to-wit:

"Particular No. 1. To strike out from the entry of said judgment the following words: 'It is, therefore, considered, adjudged and decreed by the court that the plaintiffs take nothing in this action except as hereinafter provided in the distribution of the proceeds of the sale of lands, comprising the trust estate hereinafter described,' and for cause plaintiffs say that so much of

said ruling as above quoted contravenes the law of the case as decided by the Supreme Court on the former appeal.

"Particular No. 2. To strike out and suppress from said entry of judgment the following words, to-wit: 'It is further considered, ordered, adjudged and decreed that the defendants and cross-complainant Fidelity Trust Company, has not mismanaged, repudiated, or abandoned its trust, but has faithfully performed its duties as trustee under the deeds and trust agreement set out in the pleadings and special findings,' and for cause plaintiffs say that so much of said entry of judgment as quoted above contravenes the law of the case as adjudged by the Supreme Court on the former appeal in this case.

"Particular No. 3. To strike out and suppress from said entry of judgment the following words, to-wit: 'By taking proper steps under said instruments to sell the same and otherwise, and now holds the [Printed Transcript Page 51] legal title to [fol. 105] said lands as trustee for the sole purpose of completing its duties and obligations, as such trustee, by making sale of the same and by making distribution of the proceeds according to the terms of said deeds and trust agreement, and not otherwise, and in no other capacity,' and for cause plaintiffs says that so much of said entry of judgment as quoted above contravenes the law of the case as adjudged by the Supreme Court on the former appeal in this case.

"Particular No. 4. To strike out and suppress from entry of judgment the following words, to-wit: 'That said defendant and cross-complainant Fidelity Trust Company, as such trustee, holds the legal title to said lands and the appurtenances thereunto belonging, and is fully and lawfully empowered and under the duty to sell and convey said lands by warranty of the fee simple title, and give full possession of the same,' and for cause plaintiffs say that so much of said entry of judgment as quoted above contravenes the law of the case as adjudged by the Supreme Court on the former appeal in this case.

"Particular No. 5. To strike and suppress from entry of judgment the following words, to-wit: 'It is further considered, ordered, adjudged and decreed that said Fidelity Trust

Company is entitled to judgment on its account against said trust estate to be paid out of the proceeds of the sale of the lands so held in trust by it, as hereinbefore provided, in the sum of Fifty Thousand, Six Hundred and Ninety-Seven Dollars (\$50,697.00), and for cause plaintiffs say that so much of said [fol. 106] entry of judgment as quoted above contravenes the law of this case as adjudged by the Supreme Court on the former appeal in this case.

"Particular No. 6. To strike out and suppress from entry of judgment the following words, to-wit: 'It is further considered, ordered, adjudged and decreed that said plaintiffs, Dora E. Rooker and William V. Rooker, by their said deeds of conveyance and trust agreement have parted with all their title to said real estate and appurtenances thereunto belonging and the right to the possession thereof and the use and rents and profits thereof and have no interest other than in such proceeds of the sale thereof as may remain to be distributed to the said Dora E. Rooker under this judgment and said trust agreement. That any other interest in or control over said lands than said interest in the proceeds, aforesaid, heretofore and now being asserted by said plaintiffs, adverse to the title of said trustee is wrongful, without right and unfounded and obstructive of the completion of the execution of said trust by said trustee and said Dora E. Rooker and William V. Rooker, be and they are, each and both hereby perpetually enjoined from denying or disputing the said title of the said Fidelity Trust Company, as trustee, to said lands above described and its right to the possession, use, rents and profits thereof, and from denying, disputing, obstructing or in any manner interfering with the sale of said lands by said trustee under and pursuant to its power of sale, conferred by said deeds and trust agreement, and from refusing to give possession and from in any [Printed Transcript Page 52] manner interfering with, disputing or obstructing said trustee, or any purchaser or purchasers in giving possession or in taking possession when sale shall have been made of said lands as aforesaid,' and for cause plaintiffs say that so much of said entry of judgment as quoted above contravenes the law of the case as adjudged by the Supreme Court on the former appeal in this case, and the plaintiffs would

further show unto the court that said trust was not at any time a trust of, or representing a trust of investment or of income, but said trust was solely a trust affecting the principal of said trust estate, and said trustee was to have been acting only in making the trust sale in the matter of converting said trust estate into cash and in the maintenance of said trust pending the sale and the distribution of the proceeds of said trust estate and was not at any time a trust affecting the possession, rents and profits thereof prior to such sale.

"Particular No. 7. To strike out and suppress from the entry of judgment the following words, to-wit: 'It is further considered, ordered, adjudged and decreed that said Fidelity Trust Company as trustee proceed under the power and according to the terms of said deeds and trust agreement and make and complete sale of said above described lands, convey the same by warranty deeds in fee simple and put purchaser or purchasers thereof in possession; that said Marion County lands having failed to sell for the sum of Eighteen Thousand Dollars (\$18,000.00) in the first year after the execution of said deeds and trust agreement or thereafter, said trustee having [fol. 108] given the written notice to said plaintiffs and the notice by public advertisement provided for by said trust agreement and deeds, shall proceed to sell and convey said Marion County lands above described forthwith for whatever sum they may bring, using diligence to procure the highest and best bid obtainable therefor; that if said Marion County lands do not sell for lack of a bid, then said trustee shall, after giving plaintiffs said ninety days' notice in writing of their intention so to do, sell and convey said Hamilton County lands for whatever sum they will bring over and above the upset price of Sixty-Five Thousand Dollars (\$65,000.00); that if said Hamilton County lands do not sell for said sum of Sixty-Five Thousand Dollars (\$65,000.00) for lack of a bid for that sum, then said trustee, after ninety days' notice in writing to plaintiffs of their intention so to do, shall sell said Marion County lands at public auction, for whatever sum and price they may bring, using diligence to procure the highest and best price obtainable therefor; that if upon any sale of the Marion County lands under this decree they do not fetch enough to pay the moneys and

perform the obligations against said trust estate in this action found to exist and to be due, then said trustee shall, after giving thirty days' notice to said plaintiffs of their intention so to do, proceed to sell and sell and convey said Hamilton County lands for whatever sum and price they will bring, using diligence to procure the highest and best bid therefor; that any sale or sales made under this decree shall be forthwith submitted to this court for approval or disapproval,' that for cause plaintiffs say that so much of said entry of judgment [Printed Transcript Page 53] as quoted above contravenes the law of the [fol. 109] case as adjudged by the Supreme Court on the former appeal in this case.

"Particular No. 8. To strike out and suppress from the entry of judgment the following words, to-wit: 'It is further considered, ordered, adjudged and decreed than when the sale or sales herein provided for have been made, said trustee shall apply the proceeds of said sale or sales as follows: (1) To the payment of the costs of this action; (2) to the payment of any mortgage or other lien, charge, adverse interest or incumbrance upon and against said real estate or any part of any of said real estate above described, which may be prior and superior and adverse to the interest of said Fidelity Trust Company, trustee; (3) to the payment to said Fidelity Trust Company of the judgment on account herein decreed in the sum of Fifty Thousand and Six Hundred Ninety-Seven Dollars (\$50,697.00); (4) to the reimbursement of said Fidelity Trust Company of any sum or sums which may accrue to it in the execution of said trust, after the date of this judgment and decree; (5) the rest and residue of any money derived from said sale or sales shall be paid to said Dora E. Rooker, her heirs, executors, administrators and assigns,' and for cause plaintiffs say that so much of said entry of judgment as quoted above contravenes the law of the case as adjudged by the Supreme Court on the former appeal in this case.

53. And plaintiffs further say that each and every objection and motion and plea by them made in composing the issues in said circuit court was overruled and denied and that in each [fol. 110] instance an exception by these plaintiffs was noted duly of record.

54. And plaintiffs say and would show unto the court that in due time thereafter they filed in said Circuit Court their motions for a new trial including therein the several assignments of error that in its respective rulings on the admission and exclusion of evidence said trial court erred; that each the sixth (6th), seventh (7th), eighth (8th), tenth (10th), eleventh (11th), twelfth (12th), thirteenth (13th), fourteenth (14th), fifteenth (15th), sixteenth (16th), seventeenth (17th), eighteenth (18th), nineteenth (19th), and twentieth (20th) findings was not sustained with sufficient evidence; also, that each of said findings was contrary to law; also, for error in the assessment of defendants' damages, the same being too large; also, for error in the assessment of plaintiffs' damages, being too small; that thereupon said motion for new trial was overruled whereupon plaintiffs prayed an appeal in term to the Supreme Court of Indiana, which prayer was granted upon the condition that plaintiffs should file in said cause within thirty (30) days their appeal bond in the sum of Sixty-Five Thousand Dollars (\$65,000.00) with a named surety and sixty (60) days' time was given plaintiffs in which to file all bills of exceptions.

55. And plaintiffs say and would show unto the court that the penal sum of said appeal bond was exorbitant and oppressive and was imposed for the purpose of defeating a term time appeal [fol. 111] and to obstruct the administration of justice and that plaintiffs were unable to give said bond but thereafter they did perfect a [Printed Transcript Page 54] vacation appeal of said cause in which they assigned errors to the effect, following:

First. The court erred in overruling the plaintiffs' motions to strike out the second amended counter-claim of the defendants, to which ruling of the court the plaintiffs at the time excepted.

Second. The court erred in overruling the plaintiffs' demurrers to the second amended counter-claim, to which ruling of the court the plaintiffs at the time excepted.

Third. The court erred in overruling the plaintiffs' motion to make more certain and specific the second amended counter-claim, to which ruling of the court the plaintiffs at the time excepted.

Fourth. The court erred in overruling the plaintiffs' demurrers to the supplemental second amended counter-claim, to which ruling of the court the plaintiffs at the time excepted.

Fifth. The court erred in overruling the motion of the plaintiffs for judgment on the special findings of fact, to which ruling of the court the plaintiffs at the time excepted.

Sixth. The court erred in each of the following numbered conclusions of law, to each of which conclusions of law severally and separately considered the plaintiffs at the time excepted, namely, the first, the second, the third, the fourth, the fifth and the sixth conclusions of law.

[fol. 112] Seventh. The court erred in overruling the plaintiffs' motions to modify the judgment, to which ruling of the court the plaintiffs at the time excepted.

Eight. The court erred in overruling the plaintiffs' motions for new trial, to which ruling of the court the plaintiffs at the time excepted.

Wherefore the appellants, who were plaintiffs in said cause in said court below, pray that the judgment of said Hamilton Circuit Court of Indiana, given and rendered in said cause, be in all things reversed and appellants pray for all proper relief.

56. And plaintiffs say and would show unto the court that on June 22, 1921, the Supreme Court of Indiana rendered its second opinion in this cause in substance, to-wit:

"Willoughby, J.—This case is a resumption of proceedings under the mandate of this court in *Rooker vs. Fidelity Trust Company*, 185 Ind. 172. The appellants as settlers of a trust in lands sued appellee, who was the trustee alleging a violation and repudiation of the trust and demanding damages, an accounting, that the appellee trustee be removed, and that a receiver be appointed for the trust estate to administer it under the terms of the trust agreement. Appellee on its part filed a cross-complaint in which it set up the same trust and its duties under it as trustee, its performance of all its duties save the sale of the trust estate, its reasons for not making such sale, its purpose to carry out the sale and its hinderance by appellants' interference and claim of title. It asked an accounting that [fol. 113] its title as trustee be quieted, that appellants be en-

joined and that it be decreed to make sale pursuant to the trust agreement and distribution of proceeds accordingly. [Printed Transcript Page 55]

"Appellants' complaint was answered by appellee trustee by general denial. Issue was formed on the cross-complaint of appellee trust company by answer of general denial and by special partial answers, the issues on the latter being made by replies in general denial. On these issues the cause was submitted to the court for trial, and the following special finding of facts and conclusions of law were made and stated by the court.

"The court finds the fact to be: First, that on and prior to the 11th day of October, 1909, the plaintiff, Dora E. Rooker, was the owner in fee simple of certain real estate situate in Hamilton County, Indiana. Second, that on and prior to the 11th day of October, 1909, the plaintiffs, William V. Rooker and Dora E. Rooker, husband and wife, were the owners in fee simple, as tenants by entireties, of certain real estate situated in Marion County, Indiana. Third, that on the said 11th day of October, 1909, said plaintiffs, Dora E. Rooker and William V. Rooker, her husband, executed and delivered to said cross-complainant, Fidelity Trust Company as trustee, their warranty deed for the lands in Hamilton County.

"To have and to hold, said real estate, however in trust for the use and benefit of said Dora E. Rooker and to protect and discharge the obligations arising out of claims and liens or the right of liens by reason of improvements made on the above described real estate.

[fol. 114] "Said Fidelity Trust Company of Indianapolis, Indiana, as aforesaid, to sell and convey said lands or any part of them at such prices and upon such terms as may be from time to time dictated in writing by said Dora E. Rooker; to execute the proper trustee's deed or deeds conveying the title thereto in fee simple to the purchaser; it being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis, shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as this grantor could herself do, and any such purchaser or purchasers shall in no wise be responsible for the application of the proceeds

arising from such sale in the hands of the said Fidelity Trust Company of Indianapolis, Trustee.

"And said Fidelity Trust Company of Indianapolis, as such trustee, shall have full power and authority to make contracts in writing for the sale of the foregoing real estate, or any part or all of said real estate and convey same free and clear of any incumbrance or convey the same subject to any existing incumbrances.

"And to do any and all acts and to execute any and all papers, which may be necessary to protect the interests of this grantor, the mortgagee and other lien holders in and to said real estate and to conserve the trust hereby created.

"And in the event any such liens or charge against said real estate be paid by the Fidelity Trust Company, Trustee, the said Fidelity Trust Company, Trustee, shall be subrogated to all [fol. 115] the rights of such original lien holders and the same shall be enforceable by it and collectible with interest at the rate of six per cent (6%) per annum, to be credited semi-annually as a debit and charge against said real estate. [Printed Transcript Page 56]

"This conveyance is made subject to the taxes for the years 1908 and 1909 and subject to a certain mortgage executed to the American Central Life Insurance Company by this grantor and William V. Rooker, her husband, on November 19th, 1908. Said mortgage secured the payment of certain principal note of said grantor in the sum of Fourteen Thousand Dollars (\$14,000.00) together with interest thereon and recorded in mortgage record 52, page 84, in the Office of the Recorder of Hamilton County, Indiana.

"That said Indenture by Dora E. Rooker and William V. Rooker, her husband, was received for record on the 14th day of October, 1909, and recorded in record 97, at page 117, in the Recorder's Office of Hamilton County, Indiana.

"Fourth. That on said 11th day of October, 1909, the plaintiffs, William V. Rooker and Dora E. Rooker, husband and wife, executed and delivered to said cross-complainant Fidelity Trust Company as trustee, their warranty deed for the lands in Marion County.

"To have and to hold said real estate, however in trust for the use and benefit of said grantors, William V. Rooker and Dora E. Rooker, and to protect and discharge the obligations of the [fol. 116] trust herein with the powers and limitations as follows:

Said Fidelity Trust Company of Indianapolis, Trustee, as aforesaid to sell and convey said real estate according to the terms of a certain contract of even date herewith, within one (1) year after the date of these presents for a consideration fixed in said contract and should it so happen that said real estate be not sold within said period of one (1) year, for the sum nominated in said contract, then after ninety (90) days' notice in writing, to be given to the grantors by the trustee herein, the trustee may publicly advertise said real estate and sell the same at public or private sale at such price as it may bring and upon the consummation of such sale as may be made by said Fidelity Trust Company of Indianapolis, as such trustee to execute the proper trustee's deed conveying the title thereto in fee simple to its said purchasers. It being hereby understood and agreed that any deed so executed by said Fidelity Trust Company of Indianapolis, Trustee, shall convey a good and indefeasible title in fee simple to such purchaser or purchasers as fully as these grantors could themselves do, and any such purchaser or purchasers shall in no wise be responsible for the application of the proceeds arising from such sale in the hands of the said Fidelity Trust Company of Indianapolis, Trustee, but said Fidelity Trust Company is directed to apply the proceeds, arising from such sale in the manner and for the purpose set out in the contract entered into between said grantors and said Fidelity Trust Company, trustee, on this date. [fol. 117] "The said Fidelity Trust Company of Indianapolis, as such trustee shall have full power and authority to make contracts in writing for the sale of the foregoing real estate or any part or all of said real estate and convey the same free and clear of any incumbrances or subject to any existing incumbrances, and to do any and all acts and to execute any and all papers which may be necessary to protect the interest of the grantors in and to said real estate and to [Printed Transcript Page 57] conserve the trust hereby created and it is hereby further understood and agreed that if the said Fidelity Trust

Company of Indianapolis, as Trustee, shall elect to pay any lien, charge or incumbrance existing against said real estate, the said Fidelity Trust Company, Trustee, shall be subrogated to all the rights, title and interest held by the original parties thus paid and the same shall be collectible and enforceable in its hands, together with interest thereon at the rate of six per cent (6%) per annum, to be credited semi-annually to said Fidelity Trust Company as a debit and charge against the grantors and the real estate above described.

"This conveyance is made subject to the taxes for the years 1908 and 1909 and subject also to certain mortgage executed March 12, 1909, by the grantors, William V. Rooker and Dora E. Rooker, husband and wife, to the Indianapolis Life Insurance Company to secure the payment of one principal note of the sum of Six Thousand Dollars (\$6,000.00) and interest coupon notes thereon which mortgage is recorded in mortgage record 523, page 128 in the Office of the Recorder of Marion County, State of Indiana.

[fol. 118] "That this Indenture was received for record on the 14th day of October, 1909, and recorded in Record 52, page 101 in the Office of the Recorder of Marion County, Indiana.

"Fifth. That contemporaneously with the execution of the two warranty deeds executed on the 11th day of October, 1909, to said Fidelity Trust Company, Trustee, and as part of the same transaction the plaintiffs, Dora E. Rooker and William V. Rooker, as first parties, and the defendant and cross-complainant, Fidelity Trust Company of Indianapolis, Indiana, as second party, executed in duplicate on the 11th day of October, 1909, a memorandum or contract in writing. [This memorandum or contract in writing is set out in full in the opinion in Rooker vs. Fidelity Trust Company, 185 Ind. beginning page 173].

"Sixth. That since the execution of said warranty deeds and said written memorandum, the plaintiff, Dora E. Rooker, has continued in the possession of and farmed all the lands situated in Hamilton County, Indiana, and is now in possession thereof, and that the plaintiffs, William V. Rooker and Dora E. Rooker, have continued in the possession of and farmed all of the real

estate situated in Marion County, Indiana, and are now in possession thereof.

"Seventh. That ever since the execution of said warranty deeds and the execution of said written memorandum the plaintiff Dora E. Rooker, has received all of the proceeds arising out of the Hamilton County real estate and has not at any time rendered an accounting to the Fidelity Trust Company, [fol. 119] Trustee, and the plaintiffs, William V. Rooker and Dora E. Rooker, have received the proceeds arising out of the Marion County real estate and have not at any time rendered an accounting to the Fidelity Trust Company, Trustee.

"Eighth. That Fidelity Trust Company, Trustee, has not sold or conveyed any of the real estate conveyed to it by plaintiffs and that the title of the same is now in the said Fidelity Trust Company, Trustee, and that said Fidelity Trust Company is not claiming or [Printed Transcript Page 58] asserting any other title than the title and right set forth in the deeds of conveyance and memorandum of trust, hereinbefore set out in these findings.

"Ninth. That prior to the commencement of plaintiffs' action, namely, on or about the 15th day of October, 1912, the defendant and cross-complainant, Fidelity Trust Company, Trustee, served a written notice upon the plaintiffs demanding the payment of certain sum aggregating Nineteen Thousand Six Hundred Dollars and Four Cents (\$19,604.04) and tendered for delivery its quit claim deeds conveying and quit claiming said Hamilton County and Marion County lands to the original grantors upon the payment of the aforesaid sum upon demand and stating that said quit claim deed will remain in the Office of Fidelity Trust Company for delivery until October 30, 1912, upon payment of the demand.

"Tenth. That the plaintiff, Dora E. Rooker, in the constructing of her dwelling house on the Hamilton County land contracted large liabilities to various persons, firms and corporations for work and labor done and material furnished for and used in said construction, and for large sums of money borrowed and used in said construction, and also contracted certain liabilities in her farming operations. That said

Fidelity Trust Company, Trustee, under said contract and upon the security evidenced by said two separate warranty deeds and agreement of trust, all executed and delivered October 11, 1909, did from time to time thereafter upon the written order and direction of the plaintiff, Dora E. Rooker, first pay out the total sum of Six Thousand Dollars (\$6,000.00) and did further, after paying on the written order and direction of said Dora E. Rooker the total sum of Six Thousand Dollars (\$6,000.00) let out and expend a large sum of additional money to protect its interests in and to said real estate and conserve the property. That the written orders of the plaintiff, Dora E. Rooker, issued from time to time to the defendant and cross-complainant, Fidelity Trust Company, directing the payment of certain obligations showing on their face the nature of the claim, the amount thereof, and the party to whom payment should be made, and that the signature affixed thereon is the signature of the plaintiff, Dora E. Rooker.

"Eleventh. That said Fidelity Trust Company made payment on such written orders issued from time to time by plaintiff, Dora E. Rooker, which payments are evidenced by vouchers signed by the plaintiff, Dora E. Rooker and receipted by the respective parties in whose favor the voucher is drawn aggregating the sum of Fifteen Thousand Eight Hundred Thirteen Dollars and Twenty-one Cents (\$15,813.21).

[fol. 121] "Twelfth. The said Fidelity Trust Company laid out and expended pursuant to said trust agreement the following additional amounts aggregating the sum of Twenty-one Thousand One Hundred Ninety-four Dollars and Twenty-seven Cents (\$21,194.27).

"Thirteenth. That no assets came into the possession of the Trustee other than lands described and that all the moneys paid out by the defendant cross-complainant was the money of the Fidelity Trust Company, of Indianapolis, Indiana, a corporation engaged in [Printed Transcript page 59] the business of operating a trust company under the laws of the State of Indiana, and that no part of the amount paid out and advanced has ever been repaid, and that the full amount paid out and advanced, less credits hereinafter allowed, remains wholly unpaid.

"Fourteenth. That under the agreement between the two parties the defendant and cross-complainant, Fidelity Trust Company, Trustee, is entitled to have and receive for its compensation, a trustee's fee of One Hundred and Fifty Dollars (\$150.00) which has been charged against the plaintiffs by the written order of Dora E. Rooker; a commission of two (2) per cent on loans and advancements and all moneys laid out and expended, of which One Hundred and Twenty Dollars (\$120.00) has been charged against the plaintiffs by the written order of Dora E. Rooker; and that said defendant and cross-complainant is further entitled to have and receive interest on all moneys loaned or advanced at the rate of six (6) per cent per annum.

"Fifteenth. That the plaintiffs are entitled to the following credits, to-wit: Ninety-five Dollars (\$95.00), together with [fol. 122] interest thereon at six (6) per cent from October 16, 1909, on account of the cancellation of insurance policy of Six Thousand Dollars (\$6,000.00), said sum having been charged against plaintiffs under the order and voucher dated October 16, 1909; also a credit of Five Hundred Dollars (\$500.00) with interest at four (4) per cent from August 26, 1910, less Fifteen Dollars (\$15.00) deducted from the principal amount as a premium upon the Surety Company Bond, being the proceeds of the certificate of deposit deposited with the Illinois Surety Company as collateral on a supersedeas in the case of William V. Rooker and Dora E. Rooker vs. Ludowici Caladon Company in the appellate court, which cause was affirmed on appeal and upon the judgment being paid said security returned; also a rebate of Four Hundred and Two and 81/100 Dollars (\$402.81) representing the various amounts of penalties and costs including in various payments for taxes on the Marion County Lands.

Sixteenth. There is now due and owing to the defendant and cross-complainant herein from the plaintiffs cross-defendants herein, the principal sum of Thirty-seven Thousand and Seven and 48/100 Dollars (\$37,007.48); and for the interest thereon, the aggregate sum of Fourteen Thousand Two Hundred and Seventy-one and 29/100 Dollars (\$14,271.29); and for commission at two (2) per cent on all funds paid out in excess of Six Thousand Dollars (\$6,000.00) the aggregate sum of Six Hundred and Twenty and 14/100 Dollars (\$620.14) from which

there shall be deducted the aggregate sum of Nine Hundred Eighty-two and 81/100 Dollars (\$982.81), together with interest thereon amounting to Two Hundred and Eighteen and [fol. 123] 51/100 Dollars (\$218.51), being the credits set out in the preceding finding, leaving a net aggregate balance due and owing to the defendant and cross-complainant herein in the sum of Fifty Thousand Six Hundred and Ninety-seven and 59/100 Dollars (\$50,697.59). [Printed Transcript Page 60]

"Seventeenth. That all the amounts advanced and paid out by the defendant Fidelity Trust Company, Trustee, as hereinbefore set out were advanced and paid out by it under and pursuant to said memorandum and agreement of trust and the deeds of conveyance, hereinbefore set out, to protect and preserve the trust estate and were so paid out for the personal use and benefit of the plaintiff, Dora E. Rooker, and her separate estate and were received by her and applied for such purpose and said Fidelity Trust Company, Trustee, is entitled to reimburse itself therefore according to the terms of said trust agreement by the sale of said lands therein provided.

"Eighteenth. That on the 21st day of June, 1917, the defendant Fidelity Trust Company, as Trustee, served a notice upon William V. Rooker and Dora E. Rooker of which the following is a copy:

"To William V. Rooker and Dora E. Rooker:

"Pursuant to the provisions of the deed of conveyance executed to the undersigned as Trustee, on the 11th day of October, 1909, conveying to the undersigned as Trustee the following described real estate in Marion County, State of Indiana, to-wit: The southeast quarter of the northeast quarter of section thirty-three (33), Township seventeen (17), north, [fol. 124] Range four (4), east, containing forty (40) acres more or less; also the southwest quarter of the northwest quarter of Section thirty-four (34), Township seventeen (17), north, Range four (4), east, containing forty (40) acres more or less, and the memorandum executed concurrently therewith, notice is hereby given that the Fidelity Trust Company as Trustee will ninety (90) days after the delivery hereof, publicly advertise said real estate and sell the same at the highest price obtainable and upon the consummation of a sale, the undersigned

as such trustee will execute to the purchaser a proper trustee's deed conveying the title thereto in fee simple to the purchaser. Dated at Indianapolis, Indiana, this 21st day of June, 1917.

'Fidelity Trust Company, Trustee, By W. M. Fogarty, President. Attest: James G. Flaherty, Secretary.' "

"Nineteenth. That after the execution of said deeds of conveyance and written memorandum set forth in paragraph of this finding designated third, fourth and fifth, and prior to the demand for repayment and tender of deed for reconveyance set forth in the ninth paragraph of this finding, the plaintiff, William V. Rooker acting for himself and his wife, and co-plaintiff, Dora E. Rooker, did on several occasions express and convey to defendant, the Fidelity Trust Company, their intentions to pay off the advancements, more specifically set forth in this finding, theretofore made by it under said deeds and [fol. 125] memorandum and take reconveyance of said land and otherwise by their course and conduct did induce said demand for repayment and tender of reconveyance.

"Twentieth. That said Fidelity Trust Company, Trustee used all due diligence to sell said lands mentioned and described herein in accordance with the provisions of said trust agreement, hereinbefore [Printed Transcript Page 61] set out, but that said Marion County lands were not sold within one (1) year after the execution of said memorandum and deeds and, have not yet been sold by said trustee under said trust provisions; that ninety (90) days' notice in writing was given, as set forth in the previous findings, notifying the plaintiffs of the proposed sale of said Marion County lands under said trust agreement; that the plaintiffs have been, were then and are now asserting an interest in said lands adverse to the rights of said Trust Company, as Trustee, and are now disputing and denying its right to make sale of such lands under and pursuant to the terms of the deed of conveyance and said memorandum of trust agreement, and are likewise now asserting an interest in the Hamilton County lands, adverse to the right of the said Trust Company, as Trustee, and are disputing and denying its right to make sale of such lands under and pursuant to the terms

of said deed and the memorandum of trust agreement recited in the finding above.

"That the plaintiffs, in open court, have disputed and now deny the right of the said Trust Company as Trustee, to sell the lands conveyed to it in trust, and are actively opposing such efforts to sell and now are resisting the sale of said lands or any [fol. 126] of them by said Trustee, and are now prosecuting an appeal in the appellate court from a judgment of the Marion Circuit Court, quieting the title of the Marion County lands in said Fidelity Trust Company as Trustee, and enjoining the plaintiffs herein from denying or disputing the title of said Fidelity Trust Company as Trustee to said Marion County lands and from denying, disputing, obstructing or interfering with the sale of said lands under and pursuant to its power of sale contained in the memorandum of trust.

"That the assertion of interest in said lands by plaintiffs as herein above stated adverse to the interest of Fidelity Trust Company as Trustee, under said trust agreement is unfounded and without right. Upon the foregoing facts the court states the following conclusions of law:

"1. The law is with the defendant on the issues joined on plaintiffs' complaint.

"2. The law is with the cross-complainant on the issues joined on the defendant's cross-complaint.

"3. The legal title to the lands described in the deeds and instrument of trust set out in the finding of facts is held and vested in defendant and cross-complainant, Fidelity Trust Company, Trustee, with full power to convey the same in fee simple and apply the proceeds pursuant to the terms of said trust, and said defendant is entitled to have its title quieted and to have injunction to protect the same and to restrain plaintiffs from interfering with defendant in carrying out the terms of said trust agreement.

[fol. 127] "4. The defendant and cross-complainant, Fidelity Trust Company, is entitled to proceed with the sale of said lands according to the terms of said deed and trust agreement and to apply the proceeds as therein provided. [Printed Transcript Page 62]

"5. The defendant and cross-complainant is entitled to judgment on account in the sum of Fifty Thousand Six Hundred and Ninety-seven Dollars (\$50,697.00) to be paid out of the proceeds of such sale according to the terms of such deeds and trust agreement.

"6. The defendant and cross-complainant is entitled to recover its costs in this action taxed at \$—.

"The court having found the facts specially and stated its conclusion of law thereon, now renders judgment accordingly.

"It is therefore considered, ordered, adjudged and decreed by the court that the plaintiffs take nothing in this action except as hereinafter provided in the distribution of the proceeds of the sale of the lands comprising the trust estate hereinafter described.

"It is further considered, ordered adjudged and decreed that the defendant and cross-complainant, Fidelity Trust Company has not mismanaged, repudiated or abandoned its trust, but has faithfully performed its duties as trustee, under the deeds and trust agreement set out in the pleadings and special findings, by advancing large sums of money for improvements on the lands of said trust estate and to free and preserve said estate from dissipation through liens and incumbrances, by taking proper steps under said instruments to sell the same and other-[fol. 128] wise, and now holds the legal title to said lands as trustee for the sole purpose of completing its duties and obligations, as such trustee, by making sale of the same and by making distribution of the proceeds according to the terms of said deeds and trust agreement and not otherwise, and in no other capacity. That said defendant and cross-complainant, Fidelity Trust Company, as such Trustee, holds the legal title to said lands and the appurtenance thereunto belonging, and is fully and lawfully empowered and under the duty to sell and convey said lands, by deeds of warranty of the fee simple title, and give full possession of the same, which lands are described as follows:

"All of the west half of the north half of section eighteen, (18) township eighteen (18), north, range five (5), east, lying west of

the Lake Erie and Western Railroad, containing ninety-two (92) acres more or less.

"Also the southwest quarter of section seven (7), township eighteen (18) north, range five (5), east, lying west of the Lake Erie and Western Railroad and east of White River, containing forty-eight (48) acres, more or less.

"Also the southeast quarter of section twelve (12), township eighteen (18) north, range four (4), east, containing sixty (60) acres, more or less, and lying south and east of White River.

"Also that part of the northeast quarter of section thirteen (13), township eighteen (18), north, range four (4), east, more particularly described as follows:

[fol. 129] Beginning at the northeast corner of said section and running thence west with said section line one hundred and thirty-two (132) rods more or less, to White River; thence southerly along said stream with the meanderings thereof to a point 89.95 rods south of the north line of said section; thence east 65.80 rods; thence south [Printed Transcript Page 63] 73.15 rods; thence east 68.25 rods; thence north 115.20 rods to the place of beginning, containing seventy-five (75) acres, more or less, situated in Hamilton County, Indiana.

"And the southeast quarter of the northeast quarter of section thirty-three (33), township seventeen (17) north, range four (4), east, containing forty (40) acres, more or less.

"Also the southwest quarter of the northwest quarter of section thirty-four (34), township seventeen (17) north, range four (4), east, containing forty (40) acres more or less, situated in Marion County, Indiana.

"It is further considered, ordered, adjudged and decreed that said Fidelity Trust Company, Trustee, is entitled to judgment on this account against said trust estate to be paid out of the proceeds of the sales of the lands so held in trust by it, as hereinbefore provided, in the sum of fifty Thousand Six Hundred Ninety-Seven Dollars (\$50,697.00).

"It is further considered, ordered, adjudged and decreed that said plaintiffs, Dora E. Rooker and William V. Rooker, by said deeds of conveyance and trust agreement have parted with all their title to said real estate and appurtenances thereunto

[fol. 130] belonging, and the right to the possession thereof and the use, rents and profits thereof and have no interest therein other than in such proceeds of the sale thereof as may remain to be distributed to the said Dora E. Rooker, under this judgment and said trust agreement. That any other interest in or control over said lands than said interest in the proceeds, aforesaid, heretofore and now being asserted by said plaintiffs, adverse to the title of said trustee is wrongful, without right and unfounded and obstructive of the completion of the execution of said trust by said trustee, and said Dora E. Rooker and William V. Rooker be and they are, each and both hereby perpetually enjoined from denying or disputing the said title of the said Fidelity Trust Company, as Trustee, to said lands above described and its right to the possession, use and rents and profits thereof, and from denying, disputing, obstructing or in any manner interfering with the sale of said lands by said trustee under and pursuant to its power of sale, conferred by said deeds and trust agreement, and from refusing to give possession and from in any manner interfering with, disputing or obstructing said trustee or any purchaser or purchasers in giving possession or in taking possession when sale shall have been made of said lands, as aforesaid.

"It is further considered, ordered, adjudged and decreed that said Fidelity Trust Company as such Trustee proceed under the power and according to the terms of said deeds and trust agreement and make and complete sale of said above [fol. 131] described lands, convey the same by warranty deeds in fee simple and put the purchaser or purchasers thereof in possession; that said Marion County lands having failed to sell for the sum of Eighteen Thousand Dollars (\$18,000.00) in the first year after the execution of said deeds and trust agreement or thereafter, said trustee having given the written notice to said plaintiffs and the notice by public advertisement, [Printed Transcript Page 64] provided for by said trust agreement and deeds, shall proceed to sell and convey said Marion County lands above described, forthwith for whatever sum they may bring, using diligence to procure the highest and best price obtainable therefor; that if said Marion County lands do not

sell for lack of a bid, then said Trustee shall, after giving said plaintiffs ninety (90) days' notice in writing of their intention to do so, sell and convey said Hamilton County lands for whatever sum they will bring over and above the upset price of Sixty-Five Thousand Dollars (\$65,000.00); that if said Hamilton County lands do not sell for said sum of Sixty-Five Thousand Dollars (\$65,000.00), for lack of a bid for that sum, then said trustee, after ninety (90) days' notice in writing to the plaintiffs of their intention to do so, shall sell said Marion County lands at public auction for whatever sum and price they may bring, using diligence to procure the highest and best price obtainable therefor; that if upon any sale of the Marion County lands, under this decree they do not fetch enough to pay the moneys and perform the obligation against said trust estate, in this action found to exist and to be done, then said trustee shall after giving thirty (30) days' notice to said plaintiffs of their intention so to do, proceed to sell, and sell and convey said [fol. 132] Hamilton County lands for whatever sum and price they will bring using diligence to procure the highest and best bid therefor. That any sale or sales made under this decree shall be forthwith submitted to this court for approval or disapproval.

"It is further considered, ordered, adjudged and decreed that when the sale or sales herein provided for have been made, said trustee shall apply the proceeds of said sales as follows:

- "1. To the payment of the costs of this action.
- "2. To the payment of any mortgage or other valid liens, charge, adverse interest or incumbrance upon and against said real estate or any part of any of said real estate above described, which may be prior and superior and adverse to the interest of said Fidelity Trust Company, Trustee.
- "3. To the payment of said Fidelity Trust Company of the judgment on account herein decreed in the sum of Fifty Thousand Six Hundred Ninety-Seven Dollars (\$50,697.00).
- "4. To the reimbursement of said Fidelity Trust Company any sum or sums which may accrue to it in the execution of said trust, after the date of this judgment and decree.

"5. The rest and residue of any money derived from said sale or sales shall be paid to the said Dora E. Rooker, her heirs, executors, administrators and assigns.

"From this judgment and decree appellants appeal and allege errors relied on for reversal as follows:

"1. In overruling motions to strike out the appellee's second amended counter-claim.

[fol. 133] "2. In overruling the demurrers to the second amended counter-claim for insufficiency of facts.

"3. In overruling motion to make second amended counter-claim more specific. [Printed Transcript Page 65]

"4. In overruling appellants' motion for judgment on the special findings.

"5. The trial Court erred in its conclusions of law.

"6. In overruling appellants' motion to modify the judgment.

"7. In overruling appellants' motion for a new trial.

"The first error relied on for reversal by appellants is the overruling of motions to strike out the entire second amended counter-claim and cross-complaint of appellee. An examination of the records discloses that the pleading to which reference is here made was appellee's cross-complaint as amended after the decision of this court in the case of Rooker vs. Fidelity Trust Company, 185 Ind. 172.

"The argument presented by the appellants in favor of these motions is substantially that on account of the former decision of the Supreme Court in this case and the exhibits attached to said cross-complaint no sufficient cross-complaint or counter-claim could have been written against appellants. This phase of the case need not be discussed in disposing of these motions for it is settled law that error can not be predicated upon the action of the court in overruling a motion to strike out a part or all of a pleading.

Woodhams vs. Jennings, 164 Ind. 555;

Pfau vs. State ex rel. 148 Ind. 539.

[fol. 184] "In support of their second alleged error appellants claim that the appellee trust company could not in any event,

by counter-claim sue the appellants on the subject matter of the trust estate on the facts set up in the counter-claim for the reason that the counter-claim is not relevant or germane to the complaint.

"The arguments presented by appellant in favor of their demurrers are in substance that the appellee was guilty of wrongful management of the trust property and sought to acquire title to it by wrong doing and that the trustee elected to repudiate the trust agreement and have the trust deed declared a mortgage and that by reason of having failed to succeed the rights of the trustee were lost and it has no right to recover the sums of money expended by it for the use and benefit of the appellants.

"A counter-claim is any matter arising out of or connected with the cause of action which might be the subject of an action in favor of the defendant or which would tend to reduce the plaintiff's claim or demand for damages. Burns 1914, 355.

"A counter-claim is good and germane to the principal case if it alleges matters connected with the subject of the original action.

Stanley vs. N. W. Ins. Co., 95 Ind., 254.

Excelsior Clay Works vs. De Camp, 40 Ind. App., 26.

"A counter-claim under code provisions like ours is the equivalent of the cross bill in equity and in addition includes common law recoupment.

Woodruff vs. Garner, 27 Ind., 4.

[fol. 135] "The purpose of a cross bill is to obtain full relief for all parties and a complete determination of all controversies which [Printed Transcript Page 66] arise out of the matters charged in the original bill.—10 R. C. L. p. 483.—261 et seq.

"In this case the transaction having been brought into a court of equity by appellants it was not only the right of the court to entertain a cross bill which would settle all the rights of all the parties in all of their relations in the subject matter, but it was the duty of the court if necessary, to require a cross bill to be filed which would enable it to completely settle the controversy. See Sims vs. Burk, 109 Ind., 214.

"A party who imagines he has two or more remedies or who misconceives his rights is not deprived of all remedy because he first tries a wrong one.

Bunch vs. Graves, 111 Ind., 351.

Nave vs. Powell, 62 Ind. App., 274.

"The doctrine of election of remedies is of equitable origin. It has no application to the circumstances of this case for to apply it here would work to the great harm and loss of the appellee trust company, and the unearned and undeserved large money benefits to appellants, moreover it does not apply unless in fact, two remedies are available, which is not true in this case, as the Supreme Court has decided in 185 Ind. 172. The court did not err in overruling the demurrers to the second amended counter-claim.

"In support of their third alleged error the appellants argue at length that the counter-claim was illegal. The object of a motion to make a pleading more specific is to require the pleader [fol. 136] to state with certainty what is vaguely stated in the pleading.

Elliot's App. Proc., 665.

Failey vs. Gribbling, 128 Ind., 110.

"The appellee, in its counter-claim set up very fully and in circumstantial detail the trust and its relations of it, and its title and doings as trustee, and the items of its account and the circumstances requiring the aid of the court in finally carrying out and closing the trust. There is no uncertainty or vagueness of statement and it is not claimed by appellants that there is. Their motion is based on what they call the illegality of the claim. The court did not err in overruling their motion to make more specific.

"The fourth error relied on for reversal by appellants is that the court erred in overruling plaintiffs' motion for judgment in their favor on the special findings of facts. A motion for judgment on a special finding of facts is not recognized by our practice. It is elementary that the sufficiency of the evidence to sustain the finding is raised by a motion for a new trial and that questions of law raised by the conclusions of law stated on a finding can be presented only by exceptions taken to the con-

clusions of law. The court did not err in overruling appellants' motion for judgment on the special finding of facts.

"It appears from the record that after the court filed its special finding of facts and conclusions of law thereon, the plaintiffs each respectively moved the court for judgment in their favor on the [Printed Transcript Page 67] special finding of facts and when such motions were overruled they excepted to the conclusions of law. Under such circumstances the exceptions are not available.

[fol. 137] "Exceptions to conclusions of law upon facts specially found must be taken before the taking of any other step in the cause by the excepting party.

Dickson et al. vs. Rose, 87 Ind., 103;

See also Barner vs. Bayless, 134 Ind., 600;

Chicago R. R. vs. State ex rel., 159 Ind., 237;

Medical College vs. Commingore, 140 Ind., 296.

"Though it was taken on the same day that the ruling was made an exception will not be available if it was not taken until after additional steps in the prosecution or defense of the case had been taken by the party reserving it. Fwbank's Manual (2d Ed.) 24b.

Dickson vs. Rose, 87 Ind., 103;

Barner vs. Bayless, 134 Ind., 600.

The correctness of the conclusions of law cannot be questioned by a motion to modify the judgment, nor does such motion present any question if the judgment rendered conforms to the conclusions of law. Chicago S. E. Ry. Co. vs. State ex rel, 159 Ind., 237. The judgment rendered in this case was in conformity with the conclusions of law.

The seventh error relied on for reversal by appellants is that the court erred in overruling their motion for a new trial. In support of their contention to show that the court erred in overruling said motion the appellants say that the cause was put at issue and tried on an unlawful cross-complaint; and that therefore the judgment was contrary to law. This contention was decided adversely to appellants in our ruling on the demurrers to the cross-complaint and counter-claim. The brief

of appellants does not contain a condensed recital of the evidence in narrative form as required by the rules.

[fol. 138] A statement of the evidence mixed with statements and arguments of counsel, propositions of law and citation of cases and which clearly does not purport to cover the entire evidence, does not comply with the rules of this court and does not command a consideration of a motion for a new trial involving the evidence. *Rose vs. City of Jeffersonville*, 185 Ind. 577 and cases there cited.

No question is presented on the sufficiency of the evidence. Judgment affirmed.

57. And plaintiffs say and would show unto the court that in due time and manner these plaintiffs thereafter presented to the Supreme Court of Indiana in said cause their petition for a rehearing which upon consideration was denied; that thereupon these plaintiffs presented to the Supreme Court of the United States their petition for a writ of certiorari to be issued out of said Supreme Court to fetch up the record of said Supreme Court of Indiana in said cause for examination and review, but said petition for certiorari was denied; that thereupon these petitioners sued out their writ of error in the Supreme Court of the United States directed to the Supreme [Printed Transcript Page 68] Court of Indiana for the examination and determination of the questions arising upon said record, but thereafter said writ of error was dismissed on the stated ground that among said questions presented for review there was no Federal question and therefore no ground for the jurisdiction of the Supreme Court of the United States; and of these things these plaintiffs inform this Honorable Court in the purpose [fol. 139] and to the end that the Court may be advised that these plaintiffs seek equity because of the absence of a remedy at law for redress of the wrongs inflicted upon them in and by the second opinion and judgment of the Supreme Court of Indiana affirming the second opinion and judgment of said Hamilton Circuit Court, and approving said judgment of said Marion Circuit Court.

58. And these plaintiffs say and would show unto the court that among the wrongs inflicted upon them in and by the second

opinion and judgment of the Supreme Court of Indiana affirming the second opinion and judgment of said Hamilton Circuit Court and the judgment of said Marion Circuit Court are the following to-wit:

A. Within the province and under the sole authority of said Amended Act of March 5, 1915, said Hamilton Circuit Court assumed and exercised the power to act arbitrarily and to exercise a discretion not within the law and thereupon said Hamilton Circuit Court falsely construed the mandate of the Supreme Court of Indiana, on said first appeal to mean, not that said cause should be retried upon the issues, as said mandate had in fact and in law directed should be done, but to mean that said Circuit Court might, could and should pursue arbitrarily and capriciously any purpose of its own in the premises and thereby impair the obligation of said trust agreement, and the concurrent deeds, by denying and withholding from said trust agreement and from said trust deeds the usual and ordinary remedies and processes of the law of trusts, which remedies and processes had been and were allocated to said contract and deeds and became of their obligation in and by said first opinion [fol. 140] of said Supreme Court on said first appeal; that forasmuch as said Amended Act of March 5, 1915, wrongfully pretended to and did authorize said Hamilton Circuit Court to disregard, arbitrarily and capriciously, the said first opinion and mandate of said Supreme Court in this cause said Amended Act did impair the obligation of said contract, viz. said trust agreement and trust deeds, in contravention of Article I, Section 10 of the Constitution of the United States. And forasmuch as said Hamilton Circuit Court, on the retrial of said cause, arbitrarily and capriciously, followed and carried out the provisions of said Amended Act of March 5, 1915, said Hamilton Circuit Court did deny and withhold from said trust agreement and said trust deeds the usual and ordinary remedies and process of the law of trusts, which remedies and processes had been and were allocated to said contract and deeds and became of their obligation in and by said first opinion of said Supreme Court on said first appeal; that in the premises said Hamilton Circuit Court in the retrial of said cause did deny to these plaintiffs the equal protection of the law and did

take their property without due process of law in [Printed Transcript Page 69] contravention of the Fourteenth Amendment of the Constitution of the United States; that forasmuch as said Supreme Court on said second appeal affirmed said second judgment of said Hamilton Circuit Court said Supreme Court thereby did deny to these plaintiffs the equal protection of the law and did take their property without due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States.

[fol. 141] B. Upon the retrial of said cause said Hamilton Circuit Court arbitrarily and capriciously disregarded the mandate of said Supreme Court and opened the issues of said cause as of date June 27, 1917, when there was filed in said cause "the second amended counter-claim of the Fidelity Trust Company in its corporate capacity proper and as trustee;" that by over-leaping and disregarding the many years which elapsed since the 30th day of October, 1912, when this action was begun said Hamilton Circuit Court arbitrarily and capriciously cast aside and refused to consider all the wrongs done to said trust estate prior to the bringing of this action and prior to the filing of said second amended counter-claim on June 27, 1917; that upon and by its said action in thus dating the right of action in this cause from June 27, 1917, said Hamilton Circuit Court arbitrarily and capriciously cast aside and disregarded the plaintiffs' complaint in said cause and cast aside and disregarded all of the many grievous wrongs of nonfeasance and malfeasance done by said Trust Company to said trust estate and to these plaintiffs prior to October 30, 1912 and from October 30, 1912, to June 27, 1917, and thereby said Hamilton Circuit Court denied to these plaintiffs the equal protection of the law and took the property of these petitioners without due process of law all in contravention of the Fourteenth Amendment of the Constitution of the United States. And forasmuch as the said wrongful action of said Hamilton Circuit Court was upon the sole authority of said Amended Act of March 5, 1915, said act [fol. 142] impairs the obligation of said trust contract, and the two concurrent deeds in contravention of Article I, Section 10 of the Constitution of the United States.

C. Upon the retrial of said cause said Hamilton Circuit Court arbitrarily and capriciously disregarded its own jurisdiction under the first mandate of said Supreme Court and thereupon assumed to hear and determine issues as to the interpretation and construction of said trust agreement and the trust deeds executed concurrently therewith; that in said interpretation and construction of said trust agreement and concurrent deeds said Circuit Court in contravention of the opinion and mandate of said Supreme Court, pursuant of which said Circuit Court then and there had only a limited and defined jurisdiction, said Circuit Court adjudged and determined that said trust agreement and concurrent deeds did not constitute a contract controlled with the law of trusts but on the contrary that said trust agreement and concurrent deeds constituted a contract of outright and unqualified sale of the fee simple title of said real estate by these plaintiffs to said Trust Company and that these plaintiffs thereby had parted with all their right, title and interest in and to said real estate and that their sole interest in the premises, if any, [Printed Transcript Page 70] was inchoate and such only as might hereafter vest in the contingency that said Trust Company should sell said real estate at such price as would leave an unclaimed surplus after an order of distribution devised and ordered by said court; that the determination of said issues as to the interpretation and construction of said trust agreement and concurrent deeds was [fol. 143] wholly beyond the jurisdiction of said Circuit Court under said mandate and was coram non judice and void; and the action thereafter of said Supreme Court in attempting to make valid said void judgment of said Circuit Court was itself void; that thereby said Circuit Court and said Supreme Court denied to these plaintiffs the equal protection of the law and took the property of these plaintiffs without due process of law, all in contravention of the Fourteenth Amendment of the Constitution of the United States.

D. Upon the retrial of said cause said Hamilton Circuit Court arbitrarily and capriciously disregarded its own record, without any impeachment thereof, and so disregarding its own record failed and refused to accord any potency or credit whatsoever to (1) the record and proceedings on the Sheriff's sale of the Marion

County lands of the trust estate pursuant of the first judgment of said Circuit Court; to (2) the record and proceedings on the Sheriff's sale of the Hamilton County lands of the trust estate pursuant of the first judgment of said Circuit Court and further disregarding its own jurisdiction and the issues before it adjudged and determined the reformation of said trust agreement and concurrent deeds to the effect of changing them from a contract controlled with the law of trusts into a contract of absolute and unconditional sale by these plaintiffs and of purchase by said Trust Company leaving to these plaintiffs no right or interest whatsoever in said trust estate or in said action; that said action of said Circuit Court and said determination of the reformation of said trust contract were matters coram non [fol 144] judice said Circuit Court and said judgment was void; that the action thereafter of said Supreme Court in attempting to make valid said void judgment of said Circuit Court was itself void; that thereby said Circuit Court and said Supreme Court denied to these plaintiffs the equal protection of the law and took their property without due process of law, all in contravention of the Fourteenth Amendment of the Constitution of the United States.

E. Upon the retrial of said cause said Hamilton Circuit Court arbitrarily and capriciously disregarded the said mandate of the Supreme Court and likewise disregarded the complaint of these plaintiffs and the evidence in support thereof and thereupon accepted and adopted as true and controlling the statements in said second amended counter-claim as supplemented viz: that these plaintiffs were wholly without any interest whatsoever in said trust estate, and that they were incompetent upon their complaint to bring said trust estate into court; that further proceeding, arbitrarily and capriciously in said cause said Circuit Court rendered judgment sustaining said second amended counter-claim as supplemented and thereupon awarded judgment against said trust estate in favor of said [Printed Transcript Page 71] Fidelity Trust Company in the sum of Fifty Thousand Six Hundred and Ninety-Seven Dollars (\$50,697.00) and ordered the sale of said real estate without the benefit of valuation or appraisement laws of the State of Indiana to pay said judgment; that upon the face of the record,

to-wit, said second amended counter-claim as supplemented [fol. 145] and said judgment, said trust estate was not before the court, for that upon the averments of said counter-claim these plaintiffs were incompetent to bring said trust estate before the court and said Trust Company was at its own suit against trust estate, incompetent to defend said trust estate; that in the premises the matter of the claim of said Trust Company against said trust estate was a case prosecuted to judgment without an adversary, that said trust estate did not have its day in court in the premises, that the matter of said claim against said trust estate was coram non judice and said judgment of said Circuit Court is void; that in affirming said judgment of said Circuit Court said Supreme Court denied to these plaintiffs the equal protection of the law and took their property without due process of law, all in contravention of the Fourteenth Amendment of the Constitution of the United States.

59. And plaintiffs say and would show unto the court that said second opinion and judgment of the Supreme Court of Indiana is void because of the participation therein of Judge Louis B. Ewbank, a member of said Court who was incompetent and disqualified to sit because of interest as appears upon the facts in the premises, to-wit: There was pleaded in said second amended counter-claim and there was used in evidence on the trial of said cause over the objections of these plaintiffs a memorandum of the judgment of the Marion Circuit Court of Indiana in Cause No. 25260; that in said Cause 25260 these plaintiffs were plaintiffs and George V. Coffin, a Sheriff of Marion County, in the State of Indiana and the Fidelity Trust Company in its corporate capacity proper were defendants; that [fol. 146] said suit was to the effect that certain unlawful liens and incumbrances had been placed on certain Marion County lands of these plaintiffs by means of pretended sheriff's sales thereof; that said Marion County lands are the identical Marion County lands described in the deed of trust herein as being the Marion County lands of these plaintiffs conveyed to said trustee; that said sheriff's sales were made upon a certified copy of the judgment and decree of said Hamilton Circuit Court, which judgment and decree was thereafter set aside and vacated by the Supreme Court of Indiana

on the 5th day of October, 1915 (185 Ind. 172); that in said suit these plaintiffs further seeking to preserve said trust estate for the uses stated in said trust agreement and said deed of trust sued to have said Marion County lands cleared of the cloud placed thereon by said sale; that said action was begun by these plaintiffs, filing their complaint in the Office of the Clerk of said Marion Circuit Court and causing summons to issue thereon for the defendants named; that said complaint was filed on to-wit, the 26th day of May, 1915; that Charles E. Cox, Esq., at present one of the [Printed Transcript Page 72] attorneys in this cause of said Fidelity Trust Company was a Judge of the Supreme Court of Indiana, at the time said opinion and judgment of said Court was rendered on the 5th day of October, 1915, reversing said judgment and decree of said Hamilton Circuit Court, and apparently he participated in the rendition of said judgment of said Court and concurred therein; that when he retired from membership in said Court said Cox appeared as attorney and counsel for defendant the Fidelity Trust Company in the matters in contro-[fol. 1. 7] versy in this suit affecting this trust and he with another, filed in said Cause 25260 in said Marion Circuit Court the cross-complaint of said Fidelity Trust Company in its corporate capacity proper and the Fidelity Trust Company as trustee of the estate of Dora E. Rooker, and caused summons to be issued on said cross-complaint for said Dora E. Rooker and William V. Rooker; that said cross-complaint was on the theory that said cross-complainants had been continuous and faithful in the performance of their duties in the administration of said trust and that they had faithfully performed said duties; that said Dora E. Rooker and William V. Rooker had by their said trust deed conveyed all their interest in said trust estate; that said Dora E. Rooker and William V. Rooker were wrongfully and unlawfully meddling with said property and were interfering with and preventing said defendants from performing the duties required in the administration of said trust; that said Dora E. Rooker and William V. Rooker should be adjudged to have no interest in said trust property and that they should be restrained and enjoined from asserting any interest therein; that said Ewbank, as said Judge of said Marion Circuit

Court found against these plaintiffs as plaintiffs in said cause, and he sustained said cross-complaint on the trial of said cause and rendered judgment accordingly, including that these plaintiffs there present as plaintiffs in said complaint and as defendants in said cross-complaint had no interest in said trust property, and that they should be restrained and enjoined from asserting any interest therein; that said judgment was given and rendered by said Ewbank on the 5th day of February, 1918, and he fixed the penalty of the appeal bond therein at [fol. 148] Five Thousand Dollars (\$5,000.00), which these plaintiffs were unable to give because the legal title to their property was in the hands of said trustee; that on the 29th day of May, 1918, these plaintiffs, as said plaintiffs, filed in the Office of the Clerk of said Supreme Court their certified copy of the record, proceedings and judgment of said Marion Circuit Court in said Cause No. 25260, together with assignments of error thereon, and caused notice to be issued thereon; that said cause was docketed in said Supreme Court as Cause No. 23477, but was afterwards transferred to the docket of the Appellate Court of Indiana as Cause No. 10444, where the same is pending; questions at issue in said Cause No. 25260 and determined by said Ewbank and carried into the record of said Cause in said Hamilton Circuit Court upon the said second amended counter claim as supplemented and the proof thereof embody issues involved in this complaint, all to the effect [Printed Transcript Page 73] that said Ewbank in sitting as a judge in said cause in said Supreme Court passed upon his own errors while sitting as a judge in said Cause No. 25260 in said Marion Circuit Court; that said action of said Ewbank in sitting in the determination of said Supreme Court in said cause was beyond the precedents and traditions of said court; that plaintiffs knew that said Ewbank sat with the other members of said court at the oral argument of said cause, but plaintiffs then believed, as they lawfully might do, that he came upon the bench without information as to the nature and issues of said cause, and that he would recuse himself and not participate further when he be- [fol. 149] came informed; but plaintiffs say that the memorandum of the opinion of said Supreme Court filed in the Office of its Clerk in said cause, contains no notation that said Ewbank

did not sit and that the text of the said opinion as published in the advance sheets of the Northeastern Reporter does not disclose that said Ewbank did not sit; that it is a custom and usage, and may be said to be a rule of said court, to note on the memorandum of opinions and judgment where a judge does not participate in the decision of a cause, and, knowing these things and upon the information they impart, and believing them to be true, plaintiffs say that Judge Ewbank sat in the determination of said cause in said Supreme Court while he was incompetent and disqualified to sit. That in and by the law of Indiana these plaintiffs as said appellants were as a matter of right entitled to have their appeal to the Supreme Court of Indiana determined by an impartial tribunal and one without bias, prejudice or interest in behalf—their own opinion, as the same was to be rendered upon said Cause; that each and all—these rights in the premises of these plaintiffs were wrongfully and unlawfully disregarded, denied and destroyed by said Supreme Court with said Ewbank sitting therein; that because of the premises the said second opinion and judgment of said Supreme Court is void and thereby said opinion and judgment denies to these plaintiffs the equal protection of the law and it takes the property of these plaintiffs without due process of law, all in contravention of the Fourteenth Amendment of the Constitution of the United States.

[fol. 150] 60. And plaintiffs say and would show unto the court, as to the further interest of Judge Louis B. Ewbank in the matters and things involved in said Cause, and in said Cause in said Marion Circuit Court, and in said Cause in said Hamilton Circuit Court, and in said Cause in said Supreme Court of Indiana on said second appeal, and in the precedents to be established thereby in the law of Indiana to the benefit and advantage of trustees, that in and by the last will and testament of one Volney T. Malott, late of said Marion County, the said Louis B. Ewbank was nominated and appointed co-executor and co-trustee of the estate of said Malott, valued at many millions of dollars, and embracing holdings of stock in banks and trust companies, competent under the law to accept and execute trusts of the kind and character of the trust involved in this suit; that among said holdings of stock in banks

and trust companies by said Ewbank and his co-executors and co-trustees are First National [Printed Transcript Page 74] Bank, Brazil, Indiana, stock valued at Thirty Thousand Dollars (\$30,000.00); Indiana National Bank, Indianapolis, Indiana, stock valued at Six Hundred Sixty-two Thousand and Five Hundred Dollars (\$662,500.00); Union Trust Company, Indianapolis, Indiana, stock valued at Sixty-five Thousand Dollars (\$65,000.00); that it would be greatly beneficial to a trustee and to said banks and trust companies and it would enhance the value of the stock of said banks and trust companies to have the law established as being that trustees were not liable for the maladministration of their trusts nor for the waste and conversion by them of their trust estates, and that a trustee [fol. 151] could not be held to respond to the complaint of a cestui que trust that the trustee was guilty of maladministration of a trust and waste and conversion of the trust estate, and that there was no party in interest competent to invoke the jurisdiction of a court to command a trustee to fidelity in the administration of a trust, nor to invoke the jurisdiction of a court to determine that a trust agreement, of the nature and kind affected by this suit, could be adjudged to have been repudiated by the trustee and thereupon rescinded by the parties aggrieved, nor to invoke the jurisdiction of a court to remove a trustee who was at fault and to sequester the trust estate by the appointment of a receiver therefor to the end that the trust estate could be administered for the benefit of all the parties in interest and not solely for the benefit of the trustee; that said Volney T. Malott departed this life June 14, 1921, at said Marion County; that at the time of his death he was more than eighty (80) years of age; that on the 8th day of March, 1916, said Malott, knowing his advanced years and comprehending the near approach of his death in the usual processes of nature, executed his said will, wherein he nominated the said Louis B. Ewbank, together with Thomas H. Kaylor and John Malott Fletcher, co-executors of his said will, with the right of survivorship and in and by said will be appointed said Ewbank, Kaylor and Fletcher co-trustees of his estate, with the right of survivorship, said trusteeship to become effective when the statutory period had expired for the administration of said estate and the final

settlement thereof, usually a minimum of thirteen (13) months [fol. 152] after the issuance of letters, and said trusteeship was thereafter to continue in said Ewbank, Kaylor and Fletcher, and in the survivor of them, until the second day of March, 1944, an approximate period of twenty-three (23) years, when said trust was to be closed and the proceeds thereof distributed as provided in said will, said trustees to take credit for their charge, including certain annual charges payable out of the income of said estate; that said Kaylor and Fletcher are bank clerks and said Ewbank is the only lawyer among said co-executors and said co-trustees; that these plaintiffs are informed and believe, and upon information and belief state the fact to be, that said Ewbank knew of his appointment as said executor and trustee and of the interests, duties, rights, powers, opportunities and all the circumstances thereof, when the same was made, and that he had such knowledge on the 5th day of February, 1918, when as Circuit Judge he heard and determined said Cause [Printed Transcript Page 75] No. 25260 in said Marion Circuit Court; that these plaintiffs did not have, nor did either of them have, any knowledge whatsoever as to the said will of said Malott nor as to any provision thereof, nor as to the appointment of said Ewbank as such co-executor and co-trustee until after said will was probated in the Probate Court of said Marion County on the 20th day of June, 1921, when the provisions of said will were set forth in the daily newspapers and those publications imparted to these plaintiffs, and to each of them, the first information and the first means of information, they, and each of them, had as to [fol. 153] said last will and testament and as to any of its provisions and that said Ewbank had any of the interests, duties, rights, powers, opportunities and purposes which he now has, holds, entertains and enjoys; that upon the probate of said last will and testament said Ewbank duly accepted said trust and qualified and continuously thereafter performed the duties of such co-executor of said will, and thereafter he duly qualified as co-trustee of said estate, valued at many millions of dollars, under said will, and he now holds said office of co-trustee and he intends to hold said office until the end of the term thereof; that prior to the decision of this cause by the Supreme Court of

Indiana, it always had been the law of this State that the maxim prevailed, *nemo debet esse iudex in propria sua causa*—no one ought to be a judge in his own cause—and that judicial proceedings were void where the judge who made the ruling had an interest which might affect him in the performance of his duty in the premises; that upon the premises the said judgment of said Marion Circuit Court in said Cause No. 25260 was unlawful and void and its use in evidence on the trial of said cause in said Hamilton Circuit Court was unlawful and the participation of said Ewbank in the consideration of said cause in said Supreme Court was unlawful and rendered said judgment void and denied to these plaintiffs and to each of them due process of law and the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

[fol. 154] 61. And plaintiffs say and would show unto the court that since the rendition of said second judgment of said Hamilton Circuit Court the defendant Fidelity Trust Company acting solely upon the pretended authority of said judgment has taken possession of the lands of said trust estate and has appropriated and converted to its own use the rents, issues and profits thereof and is committing waste thereon in cutting young and growing timber, in failing and refusing to maintain and keep in repair buildings, fences and other structures, in pasturing fallow lands in wet seasons, in pasturing alfalfa and timothy meadows, in breaking up and destroying alfalfa and other grass growing lands; in failing, neglecting and refusing to manure and fertilize said lands, in failing, neglecting and refusing to reseed alfalfa lands; in failing, neglecting and refusing to cut alfalfa meadows, to the effect that the same produce seed and thereupon perish; in selling the soil of said lands to contractors and others who are strangers to this controversy; that the said Triangle Realty Company and Thomas West respectively claiming by, under and through said Fidelity Trust Company are in the actual physical [Printed Transcript Page 76] possession of said lands and are claiming to have an interest therein adverse to the rights of these plaintiffs; that the said claims of said Triangle Realty Company and Thomas West are wrongful and unlawful and are a cloud upon the title to said real estate and upon

the title of these plaintiffs therein; that said Triangle Realty Company and Thomas West are made parties hereto in order that they be required to set up any, each and every interest [fol. 155] they may have respectively in said real estate and in any part thereof and that such claim may be adjudged to be unlawful and without right and adverse to and a cloud upon the right, title and interest of these plaintiffs in said real estate and that such cloud may be removed by the judgment and decree of this court.

62. And these plaintiffs further say and show unto the court that they have done no wrong to any of the defendants or to said trust estate but in good faith they have many years devoted their time, services and labor to the preservation and upbuilding of said trust estate and the property thereto belonging; they admit that they have with their proper appeal to the courts sought to prevent the wrongful and unlawful appropriation and conversion of the property of said trust estate by said Fidelity Trust Company and its co-defendants herein, but all these efforts these plaintiffs had a right to make and each of them was made in a lawful and proper manner; that the reasonable worth and value of plaintiffs' costs and expenses, including fees of attorneys, solicitors and counsel is Five Thousand Dollars (\$5,000.00) per annum for each year of the (11) eleven years since the service on plaintiffs by the defendant Fidelity Trust Company on October 28, 1912 of said written notice of repudiation of said trust and renunciation of said office of trustee; that the damages to said trust property arising out of waste committed by said defendants is of the reasonable value of Ten Thousand Dollars (\$10,000.00); that the loss of crops and of the proper [fol. 156] earnings of said real estate, and of the rents, issues and profits thereof to these plaintiffs, due solely to the said misfeasance and malfeasance of said Fidelity Trust Company has damaged these plaintiffs Twenty-five Thousand Dollars (\$25,000.00); that in equity and good conscience these plaintiffs are not indebted in any sum to said Trust Company defendant but said Trust Company is largely indebted to these plaintiffs.

63. And these plaintiffs say and would show unto the court that there remain no further and outstanding liens, claims or

demands whatsoever enforceable against said trust in the hands of any person not a party to this suit but that each and every lien, claim or demand whatsoever which may be found to exist against said trust is represented in and by the persons now before the court and the court can herein do, complete and final justice.

Wherefore, plaintiffs pray the judgment and decree of this court; and that the said judgment of said Marion Circuit Court, and the said second judgment of said Hamilton Circuit Court, and the said second judgment of said Supreme Court of Indiana be adjudged to be null and void and of no effect whatsoever and that the said first judgment of said Supreme Court of Indiana be enforced and that an accounting be had herein to the purpose and end that these plaintiffs [Printed Transcript Page 77] may show to the court that in equity and right said defendants, and each of them, are wholly without any right or title to or interest in or lien upon said trust estate or the real estate thereto belonging; and will the court adjudge and decree that in and by said written notice of repudiation [fol. 157] of said trust and renunciation of the office of trustee, served on these plaintiffs on October 28, 1912, by said Fidelity Trust Company in its corporate capacity proper and by said Fidelity Trust Company as trustee, and in and by the acts and things done by said Trust Company and said trustee thereafter and upon said notice, that said Trust Company and said trustee finally and forever relinquished and released all their right, title and interest in and to said trust estate, and the real estate thereto belonging except as the court may find that the same should be held for the payment of any sum which the court may find to be due to said Trust Company as trustee on said accounting; and if the court should find that there remains any sum owing to said Trust Company as trustee on said accounting then will the court appoint a time in which such indebtedness shall be paid; and subject only to such possible right of recourse to said property for the payment of such judgment as the court may render, although these plaintiffs believe that the court will not adjudge such right to recourse, will the court adjudge and decree that the title of these plaintiffs in and to said real estate be forever quieted and that neither of said defendants has any

further interest therein nor to the possession, use, rents, issues and profits thereof. And will the court issue its temporary restraining order herein restraining and enjoining the execution of said judgment of said Marion Circuit Court in said Cause No. 25260 and, also, said second judgment of said Hamilton [fol. 158] Circuit Court in said Cause No. 16338 and enjoining the continuance of the status created under each of said judgments, and continue said restraining order until the hearing of this cause and upon said hearing will the court continue said restraining order as a temporary injunction until the trial of this cause and upon said trial will the court continue said temporary injunction as a permanent injunction. And the plaintiffs pray for all such other and further relief in the premises as to the court may seem proper and equitable and just. And all this plaintiffs forever pray. [Printed Transcript Page 78]

STATEMENT OF THE SCOPE OF THE ARGUMENT.

Properly the argument must be confined to the errors which are assigned here and to such issues arising upon the record as these assignments involve. The substance of the errors assigned is:

1. That the District Court erred in dismissing the bill of complaint for want of jurisdiction of the subject matter of the suit.

2. That the District Court erred in sustaining the motion of the respondents to dismiss the bill of Complaint.

Tr. Page 82

The substance of the motion to dismiss is: (1) That the suit is between Citizens of Indiana; (2) that no question is substantially or really involved arising under the Constitution or laws of the United States or treaties made under their authority; (3) that the averments of the bill show no equity.

Tr. Page 80

The substance of the judgment is: That "the Court being sufficiently advised, and it appearing that this Court is without jurisdiction herein, the said motion of the defendants is ordered sustained. It is, therefore, ordered and adjudged by the Court that this Cause be and the same is now hereby dismissed for want of jurisdiction at the cost of the Complainants taxed etc."

Tr. Pages 80-81

It thus appears that the judgment of the District Court is broader than the first error assigned herein, which is confined to jurisdiction of the subject matter, whereas the judgment denies jurisdiction of either and both the subject matter and the parties. It is, therefore, obvious that when the court came to consider the objection that the bill disclosed "that no question is substantially or really involved therein arising under the

Constitution or laws of the United States, or treaties made under their authority," the court was of opinion that this objection was broad enough to join issue with the averments of the Bill of Complaint to the effect that the State Courts, with their procedure in the Case when last before them, had lost jurisdiction of both the subject matter and the parties.

Pending the mandate of the Supreme Court of Indiana on the first appeal, directed to the Hamilton Circuit Court to retry the Case upon the issue joined, the Fidelity Trust Company as trustee made its first appearance as a Counter Claimant in this litigation, on June 23, 1917, about five years after the litigation was begun. The Fidelity Trust Company, as trustee, then appeared in the Marion Circuit Court, Judge Louis B. Ewbank, presiding, and there filed a Counter Claim on which it took judgment to the effect that there was no trust agreement in the sense that the creators of the trust retained any interest in the property of the trust estate; that the creators of the trust had no interest other than as creditors of the trustee and as to that only in the contingency that there should be any residue when the trustee reached the end of its career; that the claim of the creators of the trust estate to any interest therein should be and was adjudged to be unlawful and without right and they were forever restrained and enjoined from asserting any interest in said property; that there was a trust but it was one which should be performed under the order and direction of the Court.

Printed Transcript, Pages 72-74; *Ante*, Statement of the Bill of Complaint Clause 59.

The interference of the Marion Circuit Court was obviously unlawful and without jurisdiction. Judge Ewbank's attitude in respect of the fiduciary relations of trustees to trust funds is within the judicial knowledge of this Court. That attitude is demonstrated first in a Case where he appeared as counsel:

McCreery v. Nordyke, 23 Ind., App. 630.

The offending act of the General Assembly of Indiana, complained of in this suit, has been declared to be unconsti-

tutional as to embezzlers of trust funds in three cases. Judge Ewbank wrote one of those Cases.

Edwin M. Hinshaw v. State, 188 Ind., 147.

John L. Hinshaw v. State, 188 Ind., 447.

Bowen v. State 189 Ind., 644.

The injunction obtained by respondents against appellants in the Marion Circuit Court, restraining and enjoining them from protecting their interests in the property of the trust estate was clearly an unlawful invasion of the Civil rights of these appellants, being an obstruction of legal process, a denial of due process of law and of the equal protection of the law and it falls, obviously, within the inhibition of action 3933, Clause 2 of the Civil rights act.

U. S. R. S. 1980.

Thereafter the Hamilton Circuit Court unlawfully allowed the "Fidelity Trust Company in its corporate capacity proper and as trustee" to open the issues in the pending Case, for the retrial of which the Supreme Court had directed its mandate, and to file a joint Counter Claim on which they took judgment to the effect that the trust estate owed the trust Company in its corporate capacity proper and as a banker, approximately \$50,000.00 which was due and payable by the trust estate; that the creators of the trust should be and were adjudged to be without any interest in the property of the trust estate; that their Claim of any such interest was unlawful and without right and their assertion of claim should be and was forever restrained and enjoined; that said trust company should proceed to sell said lands "for whatever sum and price they will bring using diligence to procure the highest and best bid therefor. That any sale or sales made under this decree shall be forthwith submitted to this Court for approval or disapproval."

"It is further considered, ordered, adjudged and decreed that when the sale or sales herein provided for have been made, said trustee shall apply the proceeds of said sales as follows:

- "1. To the payment of the costs of this action.
- "2. To the payment of any mortgage or other valid liens, charge, adverse interest or incumbrance upon and against said

real estate above described, which may be prior and superior and adverse to the interest of the Fidelity Trust Company, Trustee.

"3. To the payment of said Fidelity Trust Company of the judgment on account herein decreed in the sum of Fifty Thousand Six Hundred and Ninety-Seven Dollars (\$50,697.00).

"4. To the reimbursement of said Fidelity Trust Company any sum or sums which may accrue to it in the execution of said trust after the date of this judgment and decree.

"5. The rest and residue of any money derived from said sale or sales shall be paid to said Dora E. Rooker, her heirs, executors, administrators and assigns."

Printed Transcript Pages 64-65; *Ante*, Statement of the Bill of Complaint Clause 56.

At the trial of the Case on this joint Counter-claim the Ewbank judgment was pleaded and used in evidence and adopted in the decree of the Hamilton Circuit Court.

From this judgment of the Hamilton Circuit Court the creators of the trust appealed to the Supreme Court of Indiana. Pending that appeal Judge Lawson M. Harvey of the Supreme Court died and Judge Louis B. Ewbank was appointed to fill the vacancy. When that appeal came on to be heard in the Supreme Court Judge Ewbank sat in the determination of the cause with the judgment which was rendered on June 22, 1921, and which appears in the printed transcript in this appeal at pages 55-68.

The appellate procedure act of Indiana allows sixty days after judgment in which to file a petition for rehearing in the Supreme Court. Pending that period one Volney T. Malott of Indianapolis died, possessed of an estate valued at many millions of dollars and holding large investments in trust companies and in banks competent to act as trustee and to perform trusts, such as the one involved in this Case. When Malott's will which was executed on March 8, 1916 came to be probated it revealed to the public, and to these appellants, that it appointed Ewbank an executor of the will and a trustee of the estate, the trusteeship to continue for about twenty-five years. Thus Ewbank was the inchoate trustee of Malott's estate

when in the Marion Circuit Court he rendered the judgment enjoining the creators of this trust, and its *cestuis que trustent* from prosecuting a suit against a trustee to conserve the trust estate against acts of malfeasance and misfeasance by its trustee.

Printed Transcript Pages 72-76; *Ante*, Statement of the Bill of Complaint Clauses 59-60.

The effect of Judge Ewbank's judgment in the Marion Circuit Court was to nullify this trust agreement and substitute in its place as a conventional trust, a trust arising upon implications of law.

In a relative sense the creators of the trust have been stripped of their rights and remedies as they were stated in the trust agreement, and in the laws which attended its performance, and the creators have been made wards of the Courts which are proceeding with the determination of duties in the form and manner prescribed in the statutes concerning trusts which arise under the law.

A better statement of the situation is made by an accepted authority, which we quote: "The powers of trustees under deeds of trust * * * depend entirely upon the terms of the deeds, such powers are created by, and exist in the deeds, and, of course, they exist in the terms in which they are created, and in no others. They are to be exercised by the trustees *in pais*. They are wholly matters of convention and contract between the parties, and not of law or jurisdiction. They can be exercised because they are conferred by one party upon another and not because the law or the Courts have conferred or authorized them. Statutes in some of the States have regulated their execution, but such statutes do not create the powers themselves."

II Perry on Trusts (5th Ed.) Sec. 602g.

The act of March 5, 1915, of the General Assembly of Indiana, Entitled "An act to amend an act entitled "An act concerning proceedings in Civil and Criminal Cases" approved March 15, 1913, is in contravention of Article 1, section 10, Clause 1 of the Constitution of the United States for that it impairs the obligation of the trust agreement in suit in this Cause. (Printed Transcript Page 28; *Ante*, Statement of the

Bill of Complaint, Clause 29; Ind. Acts 1913 P. 850; Ind. Acts. 1915 P. 123; 1 Burns R. S. 1914 sec. 343A.)

The act impairs the obligation of said Contract by denying to it the processes and remedies of the law as those processes and remedies existed at the time the Contract was executed on October 11, 1909. (Printed Transcript Page 8; *Ante*, Statement of the Bill of Complaint, Clause 8; Printed Transcript Page 7; *Ante*, Statement of the Bill of Complaint, Clause 9; Printed Transcript Page 9; *Ante*, Statement of the Bill of Complaint Clause 10.)

This impairment is brought about by those provisions of the act which allow "Conclusions" to be substituted for facts and with no definition or prescription as to the Conclusions, i.e. whether they be as broad as the human imagination or less than that, whether they be palpably false or false only upon demonstration.

In *United States v. Cohen Grocery Co.* 255 U. S. 81; 65 L. E. 516, this Court held the Lever act to be unconstitutional, *inter alia*, because it placed upon the judiciary the duty of prescribing conclusions as standards of conduct where in the terms of the Constitution, that duty, of prescribing standards, belonged to the Congress or elsewhere than to the Judiciary.

In *United States v. Cohen Grocery Co.* *supra* the conflict, of province to exercise a power or perform a duty, was a conflict between the Congress which wrote the law and the Judiciary which was called upon to enforce that law whereas the conflict here is between a party who wrote a Contract and the Judiciary which was called upon to enforce that contract. The appellants contend that the liberty of contract guaranteed to them by the Constitution is as distinct and as definite, as the duty of Congress to enact laws is distinct and definite and therefore that the *Cohen Grocery Case* is influential here.

In their generic sense two Federal questions are presented upon the averments of the Bill of Complaint and the joinder of issue made with the motion to dismiss the Bill. However there are apparent many expositions of each of these questions. In some instances these expositions appear to overlap so that

the zone of separation becomes indistinct between the two classes. This confusion is traceable to the matter of interpretation and construction of the offending statute. If the statute means to effect the application given to it by the State Courts, then the legislature has impaired the obligation of the trust agreement at issue in this Case. In that event the application which we shall bring to this Courts attention involves the Contract clause of the Constitution.

On the other hand, if the offending statute does not warrant the application given to it by State Courts then it is the Courts which are at fault and the grievances complained of do not come within the scope of the protection granted with Article I section 10 of the Constitution of the United States but instead they come within the scope of the protection granted with the Fourteenth Amendment of the Constitution of the United States.

We shall endeavor to segregate the expositions of the law according to the categories in which they appear at first blush but shall commit their final solution to the more timely and patient deliberation of the Court, assuming that upon that deliberation the Court will not say to us that our presentation of these various matters were not considered because we gave them the wrong name or placed them in a category to which in the Courts opinion they should not belong. This court has held that a trial court proceeds without jurisdiction where it lays restraint upon a party to present his Cause in Court and that a judgment rendered in such circumstances is void because it contravenes the due process clause of the Constitution and denies to the party aggrieved the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States. Surely with the rights of these appellants to appear and defend the trust estate prohibited with both an adjudication of no interest and with an injunction restraining and enjoining the assertion of any interest in the trust estate, these appellants were disqualified, so far as the law could disqualify them, from appearing and defending the trust estate. In the eye of the law, therefore, the trust estate had no defense or protection at the hands of these appellants. But these appellants and the appellees were the

only parties to the action. The trustee joined with its creditor, the trust company as a banker, in prosecuting the banker's claim and the trustees' claim against the trust estate. It is obvious therefore that the trust estate was not in court in the proceedings against it which culminated in the judgment here complained of and the judgments are void.

McVeigh v. United States, 11 Wall. 259; 20 L. E. 80.

Windsor v. McVeigh, 93 U. S. 274; 23 L. E. 915.

Pennoger v. Neff, 95 U. S. 714; 24 L. E. 565.

Ex Parte Virginia 100 U. S. 339; 25 L. E. 676.

Reynolds v. Stockton 140 U. S. 254; 35 L. E. 464.

Hovey v. Elliot 167 U. S. 409; 42 L. E. 215.

U. S. R. S. Sec. 1980.

Again, when the Trust Company in its corporate capacity proper and as trustee prevailed upon the Court to declare the trust agreement at an end, that act not only impaired the obligation of the Contract, but it made the trustee, as the trustee intended it should make, a trustee by implication of law instead of a trustee by convention. When the Trust Company in this fashion got rid of the trust contract it got rid of the instruments which conveyed to it the title to the property of the trust estate and thereafter it "took under the law." Now the law makes ample provision whereby a trustee may "take under the law" but that taking creates only a limited and special title and restricts the extent of the trustees only to the purpose of sale of so much of the property of the trust estate as is required to pay debts. Any such sale as may be made under the law, as distinguished from a sale under the Contract, must be upon appraisalment and with notice as the law provides. All these provisions of the law are disregarded and ignored by the judgment of the Court. Under the authorities the judgments are void, as we shall show presently, and they take the property of the trust estate without due process of law and in denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States.

The foregoing summary of points was intended only to direct the Courts attention to the Federal questions upon which we now shall enter in detail.

BRIEF OF THE ARGUMENT.

THE FIRST PROPOSITION

Federal Courts have jurisdiction where there is a state law involved which impairs the obligation of a Contract; also, where there is a judicial determination of an issue without due process of law or in denial of the equal protection of the law.

THE SECOND PROPOSITION

The act of March 5, 1915, impairs the obligation of the trust agreement at issue in this Case in contravention of the Contract clause of the Constitution.

THE THIRD PROPOSITION

The State Courts upon their procedure in this litigation, when it was before them, were without jurisdiction of the parties after the first judgment of the Supreme Court and the judgments complained of herein after the first judgment of the Supreme Court were without due process of law and were in denial of the equal protection of the law and were void and the taking of property on said judgments is in contravention of the Fourteenth Amendment.

THE FOURTH PROPOSITION

The State Courts upon their procedure were without jurisdiction of the subject matter of the suit after the first judgment of the Supreme Court and the judgments rendered thereafter were without due process of law and in denial of the equal protection of the law, and were void, upon which void judgments property is now being taken.

THE FIFTH PROPOSITION

The Issues joined.

STATEMENT OF POINTS AND AUTHORITIES

Under the propositions stated *supra* we submit points and authorities which we shall attempt to correlate with the issues of fact, to-wit:

THE FIRST PROPOSITION

Federal Courts have jurisdiction of Cases where there is a State law involved which impairs the obligation of a contract;

also, where there is a judicial determination of an issue without due process of law or in denial of the equal protection of the law.

Point One

The Supreme Court, upon writ of error to a state court, will deny jurisdiction if there be present upon the record local or state issues which may have controlled the decision, even though there are present, also federal questions.

Johnson v. Risk 137 U. S. 300; 34 L. E. 683.

Eustis v. Bolles 150 U. S. 361; 37 L. E. 1111.

Allen v. Arguimbau 198 U. S. 149; 49 L. E. 990.

Bachtal v. Wilson 204 U. S. 36; 51 L. E. 357

Leathe v. Thomas 207 U. S. 93; 52 L. E. 118.

Western Union etc. Co. v. Wilson 213 U. S. 52; 53 L. E. 693.

Southern Pac. Co. v. Schuyler 227 U. S. 601; 57 L. E. 662.

Adams v. Russell 229 U. S. 353; 57 L. E. 1224.

Point Two

A District Court should take jurisdiction if there be present upon the record a single Federal question, even though there are present also local or state questions.

Siler v. Louisville etc. R. Co. 213 U. S. 175; 53 L. E. 753.

Ohio Tax Cases 232 U. S. 576; 58 L. E. 737.

Louisville etc. R. Co v. Finn 235 U. S. 601; 59 L. E. 379.

McGowan v. Parish 237 U. S. 285; 59 L. E. 955.

Point Three

A Federal Court of equity is the proper tribunal where the suit is to quiet title.

Union Pacific R. Co. v. Ryan 113 U. S. 516, 526; 28 L. E. 1098, 1101.

Shaffer v. Carter 252 U. S. 37, 46; 64 L. E. 445, 454.

THE SECOND PROPOSITION

The act of March 5, 1915, impairs the obligation of the trust agreement at issue in this Case.

Tr. Page 2, Clause 4; Tr. Page 28, Clause 29.

Point One

This act, came into the statutes of Indiana to sustain the opinion of Judge Leander J. Monks in *Agar v. State*, 176 Ind., 234 overruling *Axtell v. State*, 173 Ind., 711, and to relax the harshness of certain rules of interpretation and construction whose exposition was made in then recent test cases.

Wabash R. Co. v. Hasset, 170 Ind., 370.

Cumberland etc. Co. v. Pierson 170 Ind., 343.

Cleveland etc. R. Co. v. Perkins 171 Ind., 307.

Point Two

This act has been held to be unconstitutional as applied to men who embezzle trust funds.

Edwin M. Hinshaw v. State, 188 Ind., 147.

John L. Hinshaw v. State, 188 Ind., 447.

Bowen v. State, 189 Ind., 644.

Point Three

This Court has held uniformly that the right to have recourse to the processes and remedies of the law was an essential part of the obligation of a contract and that such right could not be impaired in the presence of the contract clause of the Constitution.

Bronson v. Kinzie, 1 How 311; 11 L. E. 143.

McCracken v. Hayward, 2 How 608; 11 L. E. 397.

Lessee of Gantly v. Ewing, 3 How 708; 11 L. E. 794.

Planter's Bank v. Sharp, 6 How 301; 12 L. E. 447.

Curran v. Arkansas, 12 How 304; 14 L. E. 705.

Hathorn v. Calif. 2 Wall 10; 17 L. E. 776.

United States v. Quincy, 4 Wall 435; 18 L. E. 403.

Christmas v. Russell, 5 Wall 290; 18 L. E. 475.

Clark v. Reyburn, 8 Wall 318; 19 L. E. 354.

Brine v. Hartford Fire Ins. Co.; 96 U. S. 627; 24 L. E. 858.

Edwards v. Kearney, 99 U. S. 559; 24 L. E. 793.

Daniel v. Tearney, 102 U. S. 415; 26 L. E. 187.

Seibert v. United States, 122 U. S. 284; 30 L. E. 1161.

McGahey v. Virginia, 135 U. S. 662; 34 L. E. 304.

Barnitz v. Beverly, 163 U. S. 118; 41 L. E. 93.
 Shapleight v. San Angelo, 177 U. S. 648; L. E. 310.
 Bradley v. Lightcap, 195 U. S. 1; 49 L. E. 65.

Point Four

On October 11, 1909, when this trust agreement was made and before this offending statute was written the following constitutional and statutory provisions of law prevailed in Indiana.

"All courts shall be open; and every man, for injury done him in his person, property or reputation shall have remedy by due course of law. Justice shall be administered freely and without purchase; completely, and without denial; speedily, and without delay." Const. Ind. Art. I, Sec. 12.

"The judicial powers of the State shall be vested in a Supreme Court, in Circuit Courts, and in such other courts as the Generally Assembly may establish." Const. Ind. Art. VII Sec. 1.

"The Supreme Court shall, upon the decision of every case, give a statement of each question arising in the record of such case and the decision of the Court thereon." Const. Ind. Art. VII. Sec. 5.

"The first pleading on the part of the plaintiff in the complaint. The complaint shall contain: First * * * Second. A statement of the facts constituting the cause of action in plain and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended." I Burns R. S. 1914; Sec. 343.

"When any pleading is founded on a written instrument or an account, the original, or a copy thereof, must be filed with the pleading. A set off or a counter claim is within the meaning of this section. Such copy of a written instrument, when not copied in the pleadings, shall be taken as a part of the record. The account, if the items are numerous, shall not be copied in the pleadings, nor be deemed a part of the record unless by order of the Court. Any variance between any pleading and copy of a written instrument filed as to matter of description or legal effect, may be amended at any time, as of course, before judgment, without causing a continuance."

I Burns R. S. 1894, Sec. 368.

"In pleading the performance of a condition precedent in a contract, it shall be sufficient to allege, generally, that the party performed all the conditions on his part. If the allegations be denied, the facts showing a performance must be proved on the trial."

I Burns R. S. 1914, Sec. 376.

"All fictions in pleading are abolished, and their use forbidden in the Courts of justice in this State."

I Burns R. S. 1914, Sec. 387.

"An answer or other pleading shall be rejected as sham, either when it plainly appears upon the face thereof to be false in fact, or when shown to be so by the answer of the party to special interrogatories propounded to him to ascertain whether the pleading is false; and all surplusage, tautology and irrelevant matter shall be set aside and struck out of any pleading, when pointed out by the party aggrieved."

I Burns R. S. 1914, Sec. 391.

"Issues arise on the pleadings, where a fact or conclusion of law is maintained by one party and controverted by the other. They are of two kinds:

"First, of law.

"Second, of fact."

I Burns R. S. 1914, Sec. 415.

"An issue of law arises upon demurrer to the complaint, answer, or reply or to some part thereof."

I Burns R. S. 1914, Sec. 416.

"An issue of fact arises:—

"First: Upon a material allegation in the complaint, denied by the answer.

"Second: Upon material new matter in the answer, denied by the reply.

"Third: Upon material new matter in the reply, which shall be considered as controverted by the opposite party without further pleading."

I Burns R. S. 1914, Sec. 417.

"Where the verdict is special, or where there has been a special finding on particular questions of fact, the Court shall render the proper judgment."

I Burns R. S. 1914, Sec. 591.

"When, upon the statements in the pleadings, one party is by law entitled to judgment in his favor, judgment shall be so rendered by the Court, though a verdict has been found against such party."

I Burns R. S. 1914, Sec. 592.

Point Five

Upon the foregoing statutes and others, for the exposition of statutes here made is complete only so far as the statutes are relevant to the particular issues tendered, the Supreme Court of Indiana, at the time this trust agreement was made, had so established the *corpus juris* of Indiana in cases on contracts as that:

A. Conclusions were wholly disregarded and the facts alone were considered in determining issues of law.

Hines v. Driver 100 Ind., 315, 323.

Avery v. Dougherty, 102 Ind., 443.

Quick, Admr. v. Taylor, 113 Ind., 540, 543.

Lawrence v. Gelcher, 116 Ind., 312, 316.

Funk v. Rentchler, 134 Ind., 68, 72.

Fain v. Burgett, 152 Ind., 55, 62.

Gise v. Cook, 152 Ind., 75, 76.

Board v. Jarneke, 164 Ind., 658, 622.

Farra v. Braman, 171 Ind., 529, 535.

Dailey v. State ex rel, 171 Ind., 646, 651.

Dillon v. Barnard, 21 Wall 430; 22 L. E. 673.

Interstate, etc. Co. v. Maxwell etc. Co., 139 U. S. 569
35 L. E. 278.

B. Where a written instrument was filed with a pleading the terms of the instrument controlled the averments of the pleading and nullified all statements in the complaint which were in conflict with the terms of the instrument.

- State ex rel. v. Geddes, 1 Ind., 577.
 Blossom v. Ball, 32 Ind., 115.
 Gilmore v. Board etc. 35 Ind., 344, 348.
 Daily v. City of Columbus, 49 Ind., 169, 173.
 Naltner v. Tappy, 55 Ind., 107, 112.
 Crandall v. Bank, 61 Ind., 349, 354.
 Cotton v. State, 64 Ind., 573, 576.
 Hurlbut v. State ex rel., 71 Ind., 154, 157.
 City of Elkhart v. Simonton, 72 Ind., 7, 18.
 Liberty etc. Assn. v. Watkins, 72 Ind., 459, 462.
 Glenn v. Porter, 72 Ind., 525, 527.
 Watson etc. Co. v. Casteel, 73 Ind., 296, 299.
 Lentz v. Martin, 75 Ind., 228, 231.
 Parker v. Teas, 79 Ind., 235, 237, 238.
 Hines v. Driver, 100 Ind., 315, 317.
 Avery v. Dougherty, 102 Ind., 443, 445.
 Brown v. Will, 103 Ind., 71.
 Blackburn v. Crowder, 108 Ind., 238, 239.
 Reynolds v. Louisville etc. R. Co., 143 Ind., 579, 621.
 Stengel v. Boyce, 143 Ind., 642, 646.
 Harrison etc. Co. v. Lackey, 149 Ind., 10, 14.
 Indiana etc. Assn. v. Plank, 152 Ind., 197, 198.
 Stewart v. Knight etc. Co., 166 Ind., 498, 502.
 Huber, etc. Co. v. Wagner, 167 Ind., 98, 100.

C. Where a special finding was outside the issues in a cause the special finding was a nullity and gave no support to a conclusion of law or judgment of the Court thereon.

- Woodard v. Mitchell, 140 Ind., 406, 411.
 Citizens Bank v. Judy, 146 Ind., 322, 349.
 Goodwine v. Cadwallader, 158 Ind., 202, 205.
 Fleming v. Greener, 173 Ind., 260, 267.

D. Where a matter was determined, and entered into judgment, which was beyond the issues, the determination was *coram non judice* and the judgment was void.

- McFadden v. Ross, 108 Ind., 512, 516, 517.
 Jones v. Vert, 121., Ind., 140, 142.

E. Where a party sued upon one issue he could not abandon that issue at the trial and recover upon an issue he had not tendered.

Johnson v. Greist, 85 Ind., 503, 505, 506.

Morgan v. Lake Shore etc. R. Co., 130 Ind., 101, 103.

Point Six

At the time this trust agreement was made and until this offending statute was passed, the law of trusts in Indiana was expressed in both judicial decisions in equity cases, and with statutes including the following:

"No trust concerning lands, except such as may arise by implication of law shall be created, unless in writing, signed by the party creating the same, or by his attorney thereto lawfully authorized in writing."

II Burns R. S. 1914, Sec. 4012.

"The record of such trust in the proper county shall be deemed actual notice thereof to every person claiming under a conveyance made or lien created, after such recording."

II Burns R. S. 1914, Sec. 4014.

"No person beneficially interested in a trust * * * but the interest of every person for whose benefit a trust for the payment of a sum in gross is created is assignable."

II Burns R. S. 1914, Sec. 4015.

"Every sale, conveyance, or other act of a trustee, in contravention of a trust is void."

II Burns R. S. 1914, Sec. 4016.

"Trustees having violated or attempted to violate any express trust or becoming insolvent, or of whose solvency or that of their sureties there is reasonable doubt, or for other cause in this discretion of the Court having jurisdiction, may, on petition of any person interested, after hearing, be removed by such Court, and all vacancies in express trusteeships may be filled by such court."

II Burns R. S. 1914, Sec. 4023.

"Upon the complaint of the trustee or *cestui que trust* of any trust, filed in the Circuit or Superior Court of the proper

County, any real estate in said County, belonging to or subject to said trust, may be sold, by order of said Court, as herein-after provided. It must be set forth in the complaint, and shown to the satisfaction of the Court, either:—

"First: That the real estate so held in trust is liable to waste or depreciation in value.

"Second: That the taxes, street assessments, or costs and expenses for repairs exceed the income of said property, and are liable to defeat the intention of the person creating the trust.

"Third: That the sale of the property and the safe and proper investment of the proceeds would inure to the advantage and benefit of the *cestui que trust* and fulfil the purpose of the trust."

II Burns R. S. 1914, Sec. 4032.

"No order or decree for the sale of said trust property shall be made until notice by summons or publication, as provided for in civil actions, shall be given to all persons having directly or remotely an interest in the trust property, all of whom shall be made parties to said proceeding."

II Burns R. S. 1914, Sec. 4033.

"The sale of said property, as to the appraisement thereof, appointment of guardian *ad litem* for infant defendants, and notice of sale, shall be governed, in all respects, by the law regulating the sales of real estate by administrators of decedent's estate. (Sales by executors and administrators, II Burns R. S. 1914, Sections 2848-2896.)"

II Burns R. S. 1914, Sec. 4034.

"The terms and conditions of the sale shall be under the direction of the Court. *Provided, however*, that if said property shall be sold at private sale, it shall not sell for less than its full appraised value; if at public sale, for not less than two-thirds of its appraised value."

II Burns R. S. 1914, Sec. 4036.

"It shall be the duty of the trustee to safely invest the money realized from such sale of the trust property upon good real

estate mortgage security, preserving the principal sum from loss or diminution, and paying over to the *cestui que trust*, the interest upon said principal sum during the continuance of the trust."

II Burns R. S. 1914, Sec. 4037.

"Upon the death of the *cestui que trust*, or upon the determination of the trust, according to the terms and conditions of the instrument creating it, it shall be the duty of the trustee to at once account for and pay over to the person or persons entitled thereto the money and assets that may be on hands, belonging to the trust."

II Burns R. S. 1914, Sec. 4038.

"If any trustee of any trust now existing shall be dead, or any trustee now or hereafter to be created shall die or for any cause refuse to act, the Circuit Court or the Superior Court of the proper county may fill the vacancy by the appointment of some suitable person, who shall execute bond for the faithful performance of the duties of his trust as hereinbefore provided."

II Burns R. S. 1914, Sec. 4039.

"Said trustee and the funds in his hands shall be at all times under the equitable control of the Court having jurisdiction thereof for the preservation of the funds and carrying out the purposes of the trust."

II Burns R. S. 1914, Sec. 4040.

Point Seven

Those sections of the statutes concerning sales by administrators of decedents' estates which are referred to *supra*, section 4034, as controlling sales by trustees, includes the following:—

"If the personal estate of a decedent shall be insufficient for the payment of the liabilities thereof, the real estate of the deceased, if any, shall be sold to make assets for the payment of such liabilities."

II Burns R. S. 1914, Sec. 2848.

"The real estate liable to be sold for the payment of debts, when the personal estate shall be insufficient therefor, shall include—

"*First:* All the real estate held or possessed by the deceased at the time of his death by legal or equitable title (except such as was held upon a contract for the purchase of lands) and all interests in real estate which would descend to his heirs.

"*Second:* All school or other lands held on a certificate of purchase of the general government or the State of Indiana.

"*Third:* All lands, and any interest therein, which the deceased, in his lifetime, may have transferred, with intent to defraud his creditors."

II Burns R. S. 1914, Sec. 2849.

"Whenever an executor or administrator shall discover that the personal estate of a decedent is insufficient to satisfy the liabilities thereof, he shall, without delay, file his petition in the Circuit Court issuing his letters, for the sale of the real estate of the deceased, to make assets for the payment of such liabilities."

II Burns R. S. 1914, Sec. 2852.

"Before filing such petition he shall carefully examine the offices of the Clerk, Auditor, Treasurer and Recorder in each County in which real estate of any deceased may be situate, and ascertain the exact character and extent of each lien thereon created or suffered by the deceased in his lifetime, and remaining unsatisfied of record."

II Burns R. S. 1914, Sec. 2853.

"Such petition shall be entitled with the names of the parties, petitioner and defendants, and the Court in which pending. If the deceased died intestate, his widow, if any, and his other heirs, shall be made defendants; if he died testate, his widow, if any, and his devisees, shall be made defendants, provided that if he died intestate as to any portion of his real estate, his heirs shall, also, be made defendants. The holder of every lien on the real estate which the executor or administrator shall have reason to deem invalid or discharged,

in whole or in part (except taxes and judgments and mortgages in favor of the State of Indiana), shall be made defendants to every such petition, and may be proceeded against by the name or style by which he or they may be designated in the record or instrument constituting such liens. Any person claiming an interest in or lien upon any of the real estate may also be made a defendant. If the names of any of the heirs or devisees of the deceased be unknown to the petitioner, such fact shall be stated in the petition, and they may be proceeded against as the unknown heirs or devisees of the deceased. The petition shall set forth a description of the real estate of the deceased liable to be made assets for the payment of his debts; the title of the decedent therein at his death, and the probable value thereof, exclusive of liens; the amount of the personal estate of the decedent which has come to the possession or knowledge of the executor or administrator; the amount of the claims filed and allowed against the estate; the amount of the claims filed and pending against the estate; the particulars of each lien, whether general or special, including taxes accrued at the death of the decedent, and judgments and mortgages, due or owing to the State, upon all or any of the decedents' real estate, appearing and remaining unsatisfied of record, with the amount and date of lien and names of the holders, as the same appears of record. If the decedent shall have died testate, and his will shall contain any provision for the disposition of his estate for the payment different from the manner which the law prescribes in case of intestacy, such provision shall be set forth in the petition. Such petition shall be verified by the oath of the executor or administrator filing the same."

II Burns R. S. 1914, Sec. 2854.

"Such petition shall stand for hearing on the first day of the next term after giving notice as provided in the next section, unless the executor or administrator shall fix a different day during the term for such hearing, by endorsement on the petition at or before the time of filing thereof. If there be not sufficient time for the giving of such notice before the close of

said term, the defendants shall be notified to appear and answer the petition on the first day of the next ensuing term."

II Burns R. S. 1914, Sec. 2855.

"Whenever any executor or administrator of any decedent's estate shall have filed in the proper Court a petition for the purpose of procuring an order for the sale of real estate, for the purpose of paying the debts of such decedent's estate, that notice of the pendency of the petition, and of the time and place of hearing the same shall be served upon the defendants personally at least ten days before the time set for hearing the same, unless it appear from the petition or affidavit filed therewith that the names or residences of any of them are unknown, or that any of them are non-residents of this State, in which case such notice shall be given by publication for three weeks successively in some public newspaper published in the County in which the administration of the estate is pending, if any be published therein, and if not, then in some public newspaper published nearest thereto in this State, at least ten days before the time set for hearing the said petition. The notices herein provided for shall be issued by the Clerk of the Court, and attested by his signature and the seal of the Court."

II Burns R. S. 1914, Sec. 2856.

"The executor or administrator shall make a correct inventory of the real estate of the decedent, and shall cause the same to be appraised by two persons competent to appraise the personal estate of the decedent. If the lands lie in more than one county, appraisers residing in each county may be appointed to appraise the lands therein situate. Such appraisers shall take and subscribe an oath that they will honestly appraise the real estate of the decedent at its fair cash value: Provided, however, that nothing in this act shall be so construed as to prevent the appraisers of one county from appraising the lands of a decedent situate in an adjoining county, where it is convenient to do so. The real estate shall be appraised in as small parcels as practicable; and if specified portions of the real estate be incumbered with special liens, the executor or administrator shall cause such specified portions to be appraised in a body, if necessary to show the value thereof.

Such appraisement, when completed, shall be attested by the appraisers, and the inventory, appraisement and oaths of the appraisers filed in court, on or before the hearing of the petition. Re-appraisement of the real estate may be afterward made under the order of the Court, when it shall be shown to the Court that the appraisement is too high or too low."

II Burns R. S. 1914, Sec. 2862.

"Upon the hearing of such petition, witnesses may be compelled to attend, and depositions, taken under the usual regulations of law, may be read, and the parties to the petition may be examined under oath as in other cases. If, upon such hearing, the Court shall find the material allegations of the petition to be true, it shall enter a decree, declaring the real estate liable to be sold to make assets for the payment of the debts and liabilities of the estate, and empowering the executor or administrator to sell so much thereof as may be found necessary to discharge said debts and liabilities. If it be shown on the hearing that the real estate, or any portion thereof, is incumbered by liens, the Court shall, in the finding, fix the amount and extent of each lien and the priorities of the several liens. If any debts secured by lien or not due, the Court shall fix the amount thereof at its present worth, rebating interest for the unexpired term, unless the real estate be sold subject to the lien. The petition shall remain pending on the docket, until the real estate, or so much as may be necessary, be sold for the payment of said debts and liabilities; and further sales may be ordered by the Court, from time to time, without further petition or notice, upon proof that the sales already made are insufficient for that purpose."

II Burns R. S. 1914, Sec. 2853.

"The Court ordering the sale shall specify the terms of sale, but no credits shall be directed to be given for a longer period than eighteen months, except that when the appraisement of the real estate is over Five Thousand Dollars, a credit may be given for a period of not more than three years. If it appear to the Court that a private sale of the real estate would be advantageous to the estate of the decedent the Court may so order, and shall, in such case, prescribe in the order the notice

to be given of the sale: *Provided*, that if the appraised value of the real estate ordered to be sold shall not exceed One Thousand Dollars, the Court may order such sale without giving notice thereof."

II Burns R. S. 1914, Sec. 1868.

"Every sale of real estate shall be at public auction, unless otherwise provided in the order of sale. Lands shall not be sold at public vendue for less than two-thirds of their appraised value, unless ordered to be sold subject to liens; in which case, they shall not be sold for less than two-thirds of their appraised value after deducting the liens. Sales of lands at private vendue shall not be for less than their appraised value, except in cases of sale subject to liens; wherein the sale shall not be for less than the appraised value, after deducting the amount of the liens."

II Burns R. S. Sec. 2871.

"In case of sale of real estate at public auction, the executor or administrator shall give four week's notice of the time, place and terms of sale, by publication in some public newspaper, if any, published in the County in which the real estate is situate, and by posting up notices thereof at least five public places in such County, three of which shall be in each township in which real estate to be sold may be situate. If the real estate or any part thereof shall be ordered to be sold subject to any lien, such fact and the particulars of the lien shall be stated in the notice."

II Burns R. S. 1914, Sec. 2872.

"Such executor or administrator shall make return, under oath, of his proceedings in the premises, at the next term after such sale, to the Court granting the order; and if such Court be satisfied therewith, it shall confirm the same and direct such executor or administrator to execute a conveyance to such purchaser of such lands or his assignee; but, upon the delivery of such conveyance to such purchaser, or his assignee, the latter shall execute and deliver to such executor or administrator a mortgage upon such premises, according to the terms of the sale, the expense of making which mortgage and the

recording thereof shall be paid by such purchaser or his assignee; which said mortgage, said executor or administrator shall cause to be recorded forthwith in the proper record of deeds of such County; and such certificate of sale, upon the delivery of such conveyance, shall be handed over to such executor or administrator; and such notes shall be retained by him, if the same are approved by the Court."

II Burns R. S. 1914, Sec. 2874.

"If there be no heir or devisee of a testator or intestate present at the death of the decedent, to take possession of the real estate left by any such testator or intestate, the executor or administrator of his personal estate may, as trustee for the proper heirs or devisees, take possession of such real estate, and demand and receive the rents and profits arising therefrom, and sue for and recover the same, and do all other acts relating to such real estate which may be for the benefit of the persons entitled thereto and consistent with their rights and interests, until the settlement of such estate, and until the Court make further order in the premises."

II Burns R. S. 1914, Sec. 2895.

Point Eight

The trust agreement as made by and between the parties is set out in Clause 8 of the Bill of Complaint.

Tr. Page 3; *Ante*, Clause 8 in the Statement of the Bill of Complaint.

Concurrently with the trust agreement and as part thereof there were executed two trust deeds by Dora E. Rooker and William V. Rooker to the Fidelity Trust Company as trustee. One of these trust deeds conveyed certain described lands, containing eighty acres, more or less, in Marion County, Indiana. The other of these trust deeds conveyed certain described lands containing two hundred and seventy-five acres, more or less, in Hamilton County, Indiana.

The trust deed conveying the Hamilton County lands is set out in Clause 9 of the Bill of Complaint.

Tr. Page 7; *Ante*, Clause 9 in the Statement of the Bill of Complaint.

Upon its execution said deed was recorded in the recorder's office of Hamilton County, Indiana, as set out in Clause 10 of the Bill of Complaint.

Tr. Page 9; *Ante*, Clause 10 in the Statement of the Bill of Complaint.

The trust deed conveying the Marion County lands is set out in Clause 11 of the Bill of Complaint.

Tr. Page 9; *Ante*, Clause 11 in the Statement of the Bill of Complaint.

Upon its execution said deed was recorded in the recorder's office of Marion County, Indiana, as set out in Clause 12 of the Bill of Complaint.

Tr. Page 11; *Ante*, Clause 12 in the Statement of the Bill of Complaint.

These instruments constituted a trust agreement to be kept and performed according to the law of trusts.

Rooker v. Fidelity Trust Co., 185 Ind., 172.

Tr. Page 18-27; *Ante*, Clause 27 in the Statement of the Bill of Complaint.

Rooker v. Fidelity Trust Co., — U. S. —, 67 L. E. — : Adv. Ops. 339.

Point Nine

On October 28, 1912, and after having entered upon the performance of the trust, the trustee served on the *cestuis que trustent* written notice of repudiation of the trust and renunciation of the office of trustee. Under the laws of Indiana as they existed prior to this offending statute that act of the trustee terminated the agreement and was an actionable wrong.

(*Supra* Point Six)

II Burns R. S. 1914, Sec. 4023.

Zimmerman v. Makepeace, 152 Ind., 199.

Wheatcraft v. Wheatcraft, 55 Ind., App. 233.

At the time this trust agreement was made and before this offending statute was enacted, it was the law of Indiana that an act of repudiation by the trustee was not only actionable

in behalf of the trustee but that the act of repudiation started the statute of limitations to running against the trust estate and, thereby, imposed the duty upon the *cestui que trust* to sue, or forfeit all rights whatsoever.

- Raymond v. Simonson, 4 Blackf. (Ind.) 71, 82, 85.
- Smith v. Calloway, 7 Blackf. (Ind.) 86, 89.
- Cunningham v. McKinley, 22 Ind., 149.
- Albert v. State ex rel, 65 Ind., 413, 420.
- Milner v. Hyland, 77 Ind., 458, 461.
- Hileman, Admr. v. Hileman, 85 Ind., 1, 5.
- Langsdale v. Woollen, 99 Ind., 575, 586.
- Board v. State, 103 Ind., 497.
- Harvey v. Ward, 111 Ind., 471.
- Thomas, Admr. v. Merry, 113 Ind., 83, 95.
- Daugherty v. Wheeler, 125 Ind., 421, 424-426.
- Wilson v. Brookshire, 126 Ind., 497, 501.
- Parks v. Satterthwaite, 132 Ind., 411, 416.
- Warner v. Warner, 132 Ind., 213, 216.
- Jones, Exr. v. Henderson, 149 Ind., 458, 460-466.
- Stanley's Estate v. Pence, 160 Ind., 636, 643.
- Hitchcock v. Cooper, 164 Ind., 632, 639.

The Indiana rule was similar to that which prevailed in other jurisdictions.

- Phillippi v. Philippe, 115 U. S. 151, 156-158; 29 L. E. 336.
- Speidel v. Henrici, 120 U. S. 377; 30 L. E. 718, 719-720.
- Felix v. Patrick, 145 U. S. 317, 330-332; 36 L. E. 719, 725-726.
- Patterson v. Hewitt, 195 U. S. 310, 321-322; 49 L. E. 214, 219.
- Benson v. Dempster 183 Ill. 309; 55 N. E. 655.
- Patterson v. Hewitt 11 N. M. 42; 66 Pac. 565; 55 L. R. A. 658.
- Felkner v. Dooley 28 Utah 239; 78 Pac. 366.
- Thorne v. Foley, 137 Mich. 651; 100 N. W. 905.

At the time this trust agreement was made, and before this offending statute was enacted, it was the law of Indiana that every act of a trustee in contravention of a trust was void.

The claim of the trustee in this Case, that the trustee is the owner of the trust estate in fee simple by virtue of unqualified purchase from the plaintiffs and appellants, is a claim in contravention of the trust and is void and can present no basis for any issue in Court upon which a judgment, *coram judice*, can be rendered to the effect that the trustee is absolved from responsibility to the *cestui que trust*, or that the rights of the *cestuis que trustent* are shut out and terminated by the trust agreement itself.

II Burns R. S. 1914, Sec. 4016.

Brackenridge v. Holland (1830) 2 Blackf. (Ind.) 377.

McCormick v. Malin (1841) 5 Blackf. (Ind.) 509.

Sturdevant v. Pike (1848) 1 Ind., 277.

Martin v. Wynkoop (1859) 12 Ind., 266.

Hunsucker v. Smith (1874) 49 Ind., 118.

Morgan v. Wattles (1879) 69 Ind., 260.

Hughes v. Willson (1891) 128 Ind., 491.

Shirk v. Neible (1900) 156 Ind., 66.

Bedford Coal etc. Co. v. Parke County Coal Co. (1909)
44 Ind., App. 390.

Point Ten

These trust deeds and the trust agreement concurrently executed, show:—

A. That Dora E. Rooker and William V. Rooker had upon and in and by the execution of the trust instruments, done every act and duty and performed every obligation incumbent, or which could become incumbent, upon them. Having no further duty or obligation to perform on their part, Dora E. Rooker and William V. Rooker obviously had no further duty or obligation the performance of which they could default.

B. Unless a falsehood, alias a "conclusion," could be substituted for a fact there was and could be no basis for any act of delinquency or default on the part of the *cestuis que trustent* which would or could accelerate, ripen or mature any obligation as against them. At the time this trust agreement was executed, and until this offending statute was enacted, it was the law of Indiana that delinquency, default or repudiation alone

could advance the maturity of an obligation and make the obligation actionable. The rule is thus stated in *Scholz v. Schneck*, 174 Ind., 186, 190:

"The statute requires a plaintiff to state a particular and sufficient claim in writing before the court will call upon the defendant to answer and then the latter is required only to answer the allegations of the complaint. The issue being thus formed, the proof will be confined thereto and if plaintiff's evidence makes out a different case however meritorious, he must fail to recover. It would be futile and absurd to require a plaintiff to state his cause of action and defendant to disclose his defense, if either might be permitted at the trial to abandon his alleged cause or defense, and pursue or meet his adversary on wholly different grounds. So, it may be said, there is no rule of procedure better established than that the plaintiff must proceed on some definite theory and recover on the case he makes in his complaint or not at all.

McAvoy v. Wright (1865), 25 Ind., 22, 21.

Paris v. Strong (1875), 51 Ind., 339, 343.

Mescall v. Tully (1883), 91 Ind., 96, 99.

Milburn v. Phillips (1894), 136 Ind., 680, 695.

Boardman v. Griffin (1875), 52 Ind., 101.

Peden v. Scott (1905), 35 Ind., App. 370.

Under the rule, a party cannot sue on an oral contract and recover on a written contract.

Toledo, Etc., R. R. v. Levy (1891), 127 Ind., 168, 170.

Johnston Harvester Co. v. Bartley (1882), 81 Ind., 406, 408.

Nor declare on a special contract and recover on an implied contract.

Davis v. Chase (1902), 159 Ind., 242.

Cleveland, Etc., R. R. Co. v. Hollowell (1909), 173 Ind., 466.

Nor sue on a special contract and recover on *quantum meruit*.

Schoffner v. Kober 1891), 2 Ind., App. 404, 414.

Sanders v. Hartge (1897), 17 Ind. App. 243.

We recall but two exceptions to the general rule. Under a special contract, where performance has been fully completed and the only duty remaining is to pay the money, it is not essential to a recovery that the suit be based on the special agreement. Assumpsit will lie in such cases.

Brown v. Perry (1859), 14 Ind., 32, 33.

Shilling vs. Templeton (1879), 66 Ind., 585, 587.

Scott v. Congdon (1886), 106 Ind., 268.

And where one party to a special entire contract has not fully complied with its terms, but, professing to act under it, has done for or delivered to the other party something of value to him which he has accepted, no action will lie on such special contract, but the party who has accepted benefits thereunder from the labor of the other will be liable to the extent of the value received by him.

Lomax v. Bailey (1846), 7 Blackf. 559.

Coe v. Smith (1848), 1 Ind., 267, 270.

Kerstetter v. Raymond (1858), 10 Ind., 199.

Becker v. Hecker (1857), 9 Ind., 497."

See also:

Mescall v. Tully, 91 Ind., 96, 98, 99.

Buchanan v. Berkshire Life Ins. Co., 96 Ind., 510.

Moore v. Sargent, 112 Ind., 484.

Horn v. Bennett, 135 Ind., 158.

Leader etc. Co. v. Grant Trust etc. Co., 174 Ind., 192.

C. The findings of maturity, default and the right of judgment are not sustained with the instruments pleaded, and recited in the judgments of the State Court rendered after the first appeal to the Supreme Court of Indiana, unless this offending statute is to prevail and change the terms and obligation of the trust agreement from that which the parties fixed. The findings of maturity, default and the right of judgment should, therefore, be disregarded as being outside of the issues and *coram non judice*, and void unless the conclusions of the pleader are with the force of this offending statute, made to displace the terms of the contract as the parties to the contract had agreed upon those terms. But the terms of the

contract are its consideration and its obligation and if the legislature attempts to authorize the Courts to disregard the terms of the contract and impair its obligations the statute is as offensive to the contract clause of the Constitution as it could be if the legislature directly, and without judicial simulation, had inhibited the performance of the contract. The findings which thus offend against the terms of the trust contract, unless the offending statute is to prevail appear *Ante* Clause 56 of the Statement of the Bill of Complaint; Page 60-62 of the Transcript.

D. The adjudication "that the defendant and cross-complainant, Fidelity Trust Company, has not mismanaged, repudiated or abandoned its trust, but has faithfully performed its duties as trustee, under the deeds and trust agreement set out in the pleadings and special findings" is not sustained with the instruments pleaded and recited in the judgments of the State Courts rendered after the first appeal to the Supreme Court of Indiana, unless the offending statute is to prevail. The adjudication which offends against the terms of the trust agreement unless the offending statute is to prevail appears *Ante* Clause 56 of the Statement of the Bill of Complaint and at Page 63 of the Transcript.

THE THIRD PROPOSITION

The State Courts upon their procedure in this litigation before them were without jurisdiction of the parties after the first judgment of the Supreme Court and the judgments complained of herein after the first judgment of the Supreme Court were without due process of law and were in denial of the equal protection of the law and were void and the taking of property on said judgments is in contravention of the Fourteenth Amendment.

Point One

This Court has held that the Courts were without authority to administer the estate of a person who was in full life.

Scott v. McNeal, 154 U. S. 34; 38 L. E. 896.

Point Two

The Ewbank judgment to the effect that the creators of the trust no longer had any interest in the property of the trust estate; that their claim of any interest in the property of the trust estate was unlawful and without right; that they should be and were restrained and enjoined from further asserting any such claim of interest, was in the form of a final judgment; it was carried forward into the second judgment of the Hamilton Circuit Court and into the second judgment of the Indiana Supreme Court.

These judgments are to be read in the light of Indiana statutes and the Cases which have interpreted them among which are the following:

"Every action must be prosecuted in the name of the real party in interest, except as provided in the next section; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract. [The exception is of executors, administrators, guardians and trustees of express trusts, etc.]."

Sec. 251 I Burns R. S. 1914.

"All fictions in pleading are abolished, and their use is forbidden in this State.

Sec. 387 I Burns R. S. 1914.

Point Three

No one can maintain an action unless he has an interest in the controversy.

Shoemaker v. Board, 36 Ind., 175.

Smock v. Brush, 62 Ind., 156.

Board v. Jameson, 86 Ind., 154.

Point Four

The Ewbank judgment having taken the creators out of Court, and that judgment having been pleaded in the Hamilton Circuit Court and approved by that Court, which rendered a similar judgment against the creators of the trust, it is obvious that there was no adversary party in Court competent and

qualified to resist the joint Counter Claim of the respondents wherein the Trust Company as trustee joined with the trust company as a banker in prosecuting the bankers claim against the trust estate. The judgment in the sum of \$50,697.00 was in favor of the banker and not the Trustee.

Point Five

Printed Transcript Page 51.

There was no cross-complaint as between the trustee and the banker and without such, there was no jurisdiction of the person of the trust estate and the judgment is void.

McFadden v. Ross, 108 Ind., 512, 516, 517.

Jones v. Vert, 121 Ind., 140, 142.

Point Six

The existence of jurisdictional facts is open to inquiry on collateral attack.

Thompson v. Whitmen, 18 Wall 457; 21 L. E. 897.

Mutual Benefit etc., Co. v. Tisdale, 91 U. S. 238; 23 L. E. 238.

Pennoger v. Neff, 95 U. S. 714; 24 L. E. 565.

Reynolds v. Stockton, 140 U. S. 254, 266; 35 L. E. 464, 468.

Hovey v. Elliott, 167 U. S. 409; 42 L. E. 215.

THE FOURTH PROPOSITION

The State Courts upon their procedure were without jurisdiction of the subject matter of the suit after the first judgment of the Supreme Court and the judgments rendered thereafter were without due process of law and in denial of the equal protection of the law and were void, upon which void judgments property is now being taken.

Point One

A public office once performed is irrevocable.

Marbury v. Madison, 1 Cranch 137; 2 L. E. 60.

Point Two

A decision once made by this Court remains forever the law of the Case.

- Martin v. Hunters Lessee, 1 Wheat. 304; 4 L. E. 97.
 Sibbald v. United States, 12 Pet. 488; 9 L. E. 1167.
 Corning v. Troy Iron etc. Co., 15 How 451; 14 L. E.
 Roberts v. Cooper, 20 How 467.
 Ex Parte Dubuque etc. Co. v. Litchfield, 1 Wall 69; 17
 L. E. 514.
 Litchfield v. Dubuque etc. R. Co., 7 Wall 270; 19 L. E. 150.
 Noonan v. Bradley, 10 Wall 121; 20 L. E. 279.
 Magwire v. Tyler, 17 Wall 253; 21 L. E. 576.
 Board v. Kennicott, 94 U. S. 498; 24 L. E. 260.
 Gaines v. Rugg, 148 U. S. 228; 37 L. E. 432.
 Illinois v. Illinois Central R. Co., 184 U. S. 77; 46 L. E. 440.
 Steinfeld v. Zeckendorf, 239 U. S. 26; 60 L. E. 125.

Point Three

The State of Indiana is authorized in its Constitution to establish a judiciary with which to hear and determine controversies between citizens of the State. This authority is attended with defined limitations which constitute due process of law.

"All courts shall be open; and every man, for injury done him in his person, property or reputation shall have remedy by due course of law. Justice shall be administered freely and without purchase; completely and without denial; speedily and without delay."

Ind. Const. Art. I, Sec. 12.

Point Four

Among the limitations which attend and enter into due process of law are these:

A. "Controversy" ceases when "res adjudicata" attaches to a subject matter and that which has become "res adjudicata" cannot afterwards be or become the subject of "controversy." When this case first went to final judgment in the Supreme

Court of Indiana as being a law controlled with the law of trusts, there no longer remained a subject of "controversy" as to the nature and legal effect of the instruments in suit.

- Fischli v. Fischli, 1. Blackf. (Ind.,) 360.
- Bradley v. Bank, 20 Ind., 528.
- Crosby v. Jeroloman, 37 Ind., 264.
- Bates v. Spooner, 45 Ind., 489.
- Ricker v. Pratt, 48 Ind., 73.
- Scott v. Indianapolis Wagon Works, 48 Ind., 75.
- McCaffrey v. Corrigan, 49 Ind., 175
- Greenup v. Crooks, 50 Ind., 410.
- Richardson v. Jones, 58 Ind., 240.
- Turner v. Allen, 66 Ind., 252.
- Griffin v. Wallace, 66 Ind., 410.
- Green v. Glynn, 71 Ind., 336.
- Newcome v. Wiggins, 78 Ind., 306.
- Ballard v. Franklin etc. Co., 81 Ind., 239.
- Bake v. Smiley, 84 Ind., 212.
- Ulrich v. Drischell, 88 Ind., 354.
- Rose v. Rose, 93 Ind., 179.

B. Where there has once been a submission of issues upon which judgment has been rendered, there is a merger of the cause of action into judgment so that afterwards the formation of issues on the original cause of action is *coram non judice* and any judgment thereon is void.

- Crosby v. Jeroloman, 37 Ind., 264, 275-8.
- Ulrich v. Drischell, 88 Ind., 354.
- McFadden v. Ross, 108 Ind., 512, 517.

C. The Ewbank judgment was entirely void in the presence of the mandate of the Supreme Court to the Hamilton Circuit Court and the pendency of the cause in Hamilton County.

- Gregory v. Purdue, 29 Ind., 66.
- Coleman v. Barnes, 33 Ind., 93.
- Plunkett v. Black, 117 Ind., 14.
- Board v. Stout, 136 Ind., 53.
- Scott v. Runner, 146 Ind., 12.

B. The only manner in which the Supreme Court itself could amend its own mandate would be by recalling the opinion at the term at which it was given.

McBride v. Coleman, 189 Ind., 7.

E. Until the present case was decided on the second appeal it had been the law of Indiana, that the law of the case once determined remained the law of the case forever, even though the rule of *stare decisis* was modified and though the law as declared in other cases of the same category should be changed as to other cases. In this case the written contracts were construed on the first appeal and no new issues could change that construction. By that construction the state had exhausted its judicial function of interpretation as to this contract.

Board v. Allman, 142 Ind., 573.

Board v. Bonebrake, 146 Ind., 311.

Westfall v. Wait, 165 Ind., 353.

Whitesell v. Metsker, 188 Ind., 1.

F. Where a trustee, or bailee, or one charged with duty abandons the property or renounces the duty the rule as to *locus poenitentiae* controls where the trustee or bailee or one charged with duty abandons the property or renounces the duty.

Union Pacific R. Co., v. Durant, 95 U. S. 576; 24 L. E. 391.

St. Louis etc. R. Co., v. Terre Haute etc. R. Co., 145 U. S. 393; 36 L. E. 748.

Roehm v. Horst, 178 U. S. 1; 44 L. E. 953.

Harriman v. Northern Securities Co., 197 U. S. 244; 49 L. E. 739.

The Eliza Lines, 199 U. S. 119; 50 L. E. 115.

Citizens etc. Bank v. Davisson, 229 U. S. 215; 57 L. E. 1153.

Central Trust Co. v. Chicago Auditorium etc. Co., 240 U. S. 581, 591; 60 L. E. 811.

U. S. v. Purcell Envelope Co., 249 U. S. 313; 63 L. E. 620.

Kurtz v. Frank, 76 Ind., 594.

Adams v. Byerly, 123 Ind., 368.

G. The Constitution of the United States was a part of this trust agreement from the moment of its execution.

Rose v. Himely, 4 Cranch 241; 2 L. E. 608.

Tennessee v. Davis, 100 U. S. 257; 25 L. E. 648.

Strauder v. West Virginia, 100 U. S. 303; 25 L. E. 664.

In re Neagle, 135 U. S. 1.

H. The purpose of this litigation in the State Courts and in the District Court was for an accounting and the right to pay whatever lawfully might be due to any person and to redeem the trust property from the situation of recalcitration into which it had been placed by the conduct of the trustee. The creators of the trust had the right to maintain the action.

Union Pacific R. Co., v. Durant 95 U. S. 576; 24 L. E. 391.

Louisiana v. Jumel, 107 U. S. 711; 27 L. E. 448.

Philippi v. Philippe, 115 U. S. 151, 156-158; 29 L. E. 336.

Graffam v. Burgess, 117 U. S. 180; 29 L. E. 839.

Speidel v. Henrici, 120 U. S. 377; 30 L. E. 718.

Felix v. Patrick, 145 U. S. 317; 36 L. E. 719.

Patterson v. Hewitt, 195 U. S. 310; 49 L. E. 214.

Point Five

Whether in fact the individual has a right of action is not important. To assume that he has none and therefore that he is not entitled to a day in Court is to assume against him the very point he may wish to contest.

Rees v. City of Watertown, 19 Wall 107, 123; 22 L. E. 72.

Point Six

"A judgment pronounced without any judicial determination of the fact which alone can support such a judgment is merely the arbitrary edict of the judge and is as much wanting in due process of law as though the party against whom it is entered had received no legal summons.

Chicago B. & Q. R. Co. v. City of Chicago, 166 U. S. 226.

Fayerweather v. Rich, 195 U. S. 276."

Hultberg v. Anderson, 252 Ill., 607, 615.

Point Seven

To reach their conclusions and judgments in this case Ewbank, and the Hamilton Circuit Court and the Supreme Court on the last appeal disregarded (1) the law of the case, (2) the Sheriff's deeds on execution sale of the trust property to the Fidelity Trust Company and a record of judicial proceedings extending from October 30, 1912 until June 23, 1917.

THE FIFTH PROPOSITION

The issues joined.

Point One

The motion to dismiss takes the place of the demurrer under the former practice and affects a joinder of issue upon the averments of the Bill of Complaint so that in the instant proceeding the questions are of pleading and of law.

Montgomery's Manual of Federal Proc. (2 ed.) Secs. 882, 883.

II Fosters Federal Practice (5 ed.) Sec. 364.

Point Two

Upon the admissions made with the motion to dismiss it is submitted that the statements in the Bill of Complaint are true to the effect following:

1. The parties are accurately described in Clauses 1-3.
Printed Transcript Pages 1-2.
2. The Federal Categories of the plaintiff grievances are accurately stated in Clauses 4-5.
Printed Transcript Page 2.
3. The ownership of the affected lands are accurately described in Clauses 6-7.
Printed Transcript Pages 2-3.
4. The execution and recording of the trust agreement and the trust deeds are accurately stated in Clauses 8-12.
Printed Transcript Pages 3-11.
5. The execution and service of the written notice of repudiation are accurately stated in Clause 13.
Printed Transcript Page 11.

6. That the bringing of the suit in the State Court, the averments of the complaint therein and of the exhibit attached are accurately stated in Clauses 14-16.

Printed Transcript Pages 12-15.

7. That the coming in of the answers and counter-claims of the sole defendant Fidelity Trust Company, the averments of the counter-claim setting up the trust agreement and deeds as a mortgage, with prayer for foreclosure, are accurately stated in Clauses 17-20.

Printed Transcript Pages 15-17.

8. That the recitals of motions, pleas and proceedings to determine the theory and scope of said answers and counter claims in said Hamilton Circuit Court are accurately stated in Clauses 21-22.

Printed Transcript Page 17.

9. That the judgment of foreclosure of the trust agreement and decree by the Hamilton Circuit Court on the counter claims of the Fidelity Trust Company, and the terms of said judgment are accurately stated in Clause 23.

Printed Transcript Page 17.

10. That the further act of repudiation of the trust agreement and renunciation of the office of trustee with the suit to foreclose the American Central Mortgage on the Hamilton County lands is accurately stated in Clause 24.

Printed Transcript Page 17.

11. That the execution sale of the Marion County lands of the trust estate; their purchase for \$4000.00 by the Fidelity Trust Company in disregard of their valuation at \$18,000.00 and the taking of title to said lands under said sheriff's deed by the Fidelity Trust Company in further repudiation of said trust agreement are accurately stated in Clause 25.

Printed Transcript Pages 17-18.

12. That the execution sale of the Hamilton County lands of the trust estate; their purchase for \$20,864.14 by the Fidelity Trust Company in disregard of their valuation at \$65,000.00 and the taking of title to said lands under said Sheriff's deed by the

Fidelity Trust Company in further repudiation of said trust agreement, are accurately stated in Clause 26.

Printed Transcript Page 18.

13. That the proceedings on the first appeal to the Supreme Court including the adjudication that the instruments at issue were a trust agreement controlled with the law of trusts and the mandate that: "The judgment of the trial court in the case at bar is unlawful and must be set aside. Judgment reversed with instructions to sustain appellants separate and several motions for new trial and for further proceedings in accordance with this opinion," together with the exhibit of the Supreme Courts opinion in the case, are accurately stated in Clause 27.

Printed Transcript Pages 18-27.

14. That the recitals of the law of the Case as matters of fact as fixed by the first opinion and judgment of the Supreme Court are accurately stated in Clause 28.

Printed Transcript Pages 27-28.

15. That the recitals of the amended act of March 5, 1915 of the General Assembly of Indiana, which is charged with impairing the obligation of the trust agreement, together with the statement of the manner in which said act impairs the obligation of said contract are accurately stated in Clauses 29-45.

Printed Transcript Pages 28-32.

A. The obligation of a contract embraces the law of the state in which the contract is made, except in those unusual situations, not present here, however, where the parties expressly stipulate that certain laws shall prevail or be excluded from the consideration of the contract; and into all contracts the Constitution of the United States enters as an essential part.

Remedies for the protection of rights under a contract enter into and are a part of its obligation, and as such they cannot in any degree be impaired. In *Edwards v. Kearzey*, 99 U. S. 595; 24 L. E. 793, Mr. Justice Swayne, speaking the opinion of this court, examined the various definitions of "obligation" and "impairment" in respect of contracts protected by the Constitution of the United States and in course of his statement

of the controlling principles, said: "The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, ceases to be and falls into the class of those "imperfect obligations," as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest.

B. Nor can there be any play upon words as to distinctions between "remedies" and "processes" of law. This court has held that the right to have recourse to processes of the law was an essential part of a contract and that it could not be impaired in the presence of the contract clause of the Constitution of the United States.

- Bronson v. Kinzie, 1 How. 311; 11 L. E. 143.
- McCracken v. Hayward, 2 How. 608; 11 L. E. 397.
- Lessee of Gantly v. Ewing, 3 How. 708; 11 L. E. 794.
- Planters Bank v. Sharp, 6 How. 301; 12 L. E. 447.
- Curran v. Arkansas, 15 How. 304; 14 L. E. 705.
- Hathorn v. Calif., 2 Wall 10; 17 L. E. 776.
- United States v. Quincy, 4 Wall 535; 18 L. E. 403.
- Christmas v. Russell, 5 Wall 290; 18 L. E. 475.
- Clark v. Reyburn, 8 Wall 318; 19 L. E. 354.
- Edwards v. Kearzey, 99 U. S. 595; 24 L. E. 793.
- Brine v. Hartford Fire Ins. Co., 96 U. S. 627; 24 L. E. 853.
- Daniels v. Tearney, 102 U. S. 415; 26 L. E. 187.
- Seibert v. U. S., 122 U. S. 284; 30 L. E. 1161.
- McGahey v. Virginia, 135 U. S. 662; 34 L. E. 304.
- Barnitz v. Beverly, 163 U. S. 118; 41 L. E. 93.
- Shapleigh v. San Angelo, 167 U. S. 648; 42 L. E. 310.
- Bradley v. Lightcap, 195 U. S. 1; 49 L. E. 65.

C. At the time this contract was written it was the law of Indiana that parties to contracts should enjoy wide latitude in stating the terms and provisions of their contracts and that

as these terms and provisions were written by the parties so they would be enforced by the courts.

McClellan v. Coffin, 93 Ind., 456, 465.

Vinton v. Baldwin, 95 Ind., 433.

Indianapolis Conservatory etc. v. McConnell, 70 Ind., App. 597.

D. And where the terms of a contract are doubtful the courts adopt that construction which the parties had put upon the contract.

Morris v. Thomas, 57 Ind., 316, 322.

Aimen v. Hardin, 60 Ind., 119, 122.

Johnson v. Gibson, 78 Ind., 282, 284.

Chicago v. Sheldon, 9 Wall 50; 19 L. E. 594.

Old Colony Trust Co., v. Omaha, 230 U. S. 100; 57 L. E. 1410.

E. At the time these contracts were made it was the law of Indiana that a *cestui que trust* could protect a trust estate against the malfeasance and misfeasance of the trustee. The subject of trusts is largely controlled with statutes, one section of which reads as follows:

"Sec. 12. Trustees having violated or attempted to violate any express trust, or becoming insolvent, or of whose solvency or that of their sureties there is reasonable doubt, or for other cause in the discretion of a court having jurisdiction, may, on petition of any person interested, after hearing, be removed by such court and all vacancies in express trusteeships may be filled by such court."

I Burns R. S. 1914, Sec. 4023.

Zimmerman v. Makepeace, 152 Ind., 199.

Wheatcraft v. Wheatcraft, 55 Ind., App. 283.

F. Courts of chancery had power independent of the statute to remove trustees for cause.

Mazelin v. Rouyer, 8 Ind., App. 27.

Ex Parte Kilgore, 120 Ind., 94.

G. The procedure in cases where the *cestui que trust* sued was definite and comprehensive.

- Raymond v. Simonson, 4 Blackf. (Ind.), 71, 82, 85.
 Smith v. Calloway, 7 Blackf. (Ind.), 86, 89.
 Cunningham v. McKinley, 22 Ind., 149.
 Albert v. State ex rel, 65 Ind., 413, 420.
 Milner v. Hyland, 77 Ind., 458, 461.
 Hileman, Admr. v. Hileman, 85 Ind., 1, 5.
 Langsdale v. Woollen, 99 Ind., 575, 586.
 Board v. State, 103 Ind., 497.
 Harvey v. Ward, 111 Ind., 471.
 Thomas, Admr. v. Merry, 113 Ind., 83, 95.
 Daugherty v. Wheeler, 125 Ind., 421, 424-426.
 Wilson v. Brookshire, 126 Ind., 497, 501.
 Parks v. Satterthwaite, 132 Ind., 411, 416.
 Warner v. Warner, 132 Ind., 213, 216.
 Jones, Exr. v. Henderson, 149 Ind., 458, 460-466.
 Stanley's Estate v. Pence, 160 Ind., 636, 643.
 Hitchcock v. Cooper, 164 Ind., 632-639.
 Philippi v. Philippe, 115 U. S. 151, 156-158; 29 L. E. 336.
 Speidel v. Henrici, 120 U. S. 377; 30 L. E. 718, 719-720.
 Felix v. Patrick, 145 U. S. 317, 330-332; 36 L. E. 719,
 725-726.
 Patterson v. Hewitt, 195 U. S. 310, 321-322; 49 L. E.
 214, 219.
 Benson v. Dempster, 183 Ill., 309; 55 N. E. 655.
 Patterson v. Hewitt, 11 N. M. 42; 66 Pac. 565; L. R. A. 658.
 Felkner v. Dooley, 28 Utah 239; 78 Pac. 366.
 Thorne v. Foley, 137 Mich., 651; 100 N. W. 905.

H. At the time the trust agreement herein was written it was the law of Indiana that exhibits filed with a pleading nullified any conclusion of the pleader which was in contradiction of the exhibit. This quality of the law enabled the parties to have their contracts in their own terms submitted to the court for construction. If there were an error in the contract it could upon proper issue be reformed, but where the issue was joined upon the instrument there could be no contradiction. If the court attempted to contradict the instrument the court's act was *coram non judice* and void.

- Mercer v. Hebert, 41 Ind., 459, 462.
 Comer v. Himes, 49 Ind., 482.

Crandall v. First National Bank, 61 Ind., 349, 354.

Cotton, Ex. v. State ex rel, 64 Ind., 571, 576.

Bayless v. Glenn, 72 Ind., 5.

Parker v. Teas, 79 Ind., 235, 237, 238.

Avery v. Daugherty, 102 Ind., 443, 445.

Reynolds v. Louisville etc. R. Co., 143 Ind., 579, 621.

16. That the rule of *res adjudicata* which, in Indiana, foreclosed the right to open issues was accurately stated upon the facts in this case in Clause 46.

Printed Transcript Page 32.

A. At the time this trust agreement was written, it was the law of Indiana as it now is the law of this Court that a distinction exists between (1) the rights of a plaintiff to elect a remedy and (2) the rights of a defendant to elect a defense. Where the plaintiff sues he may bring the wrong action. He may not therefore be concluded from bringing that form of action which properly is in accord to the remedies which he is lawfully entitled to pursue. But where a defendant is challenged to assert his rights under a contract he must present every defense he has because the rule of *res adjudicata* contemplates that everything will be concluded which (1) was put in issue and (2) also everything which should have been put in issue.

This action was begun by appellants and the respondents were challenged to assert all their defenses in answer to the complaint.

When this action was begun the complaint upon which the case was tried alleged that the Fidelity Trust Company had been made the conventional trustee of the estate of Dora E. Rooker. The making of the trust agreement was recited and the memorandum of the trust agreement was recited, and a copy of the memorandum was exhibited with the complaint as the statutes of Indiana require shall be done.

Sec. 368, I Burns R. S. 1914.

There was also exhibited with the complaint the written notice of repudiation served on Dora E. Rooker and William V. Rooker on October 28, 1912, by the Fidelity Trust Company

in its corporate capacity proper and the Fidelity Trust Company as trustee of the estate of Dora E. Rooker.

Printed Transcript Page 11.

It was the duty of the Fidelity Trust Company, as such defendant, at that time to set up its interest as trustee. In the alternative the Fidelity Trust Company might elect to repudiate the trust agreement and renounce its duties under the office of trustee. The latter course was elected. The trust company as trustee filed no answer. The trust company not as trustee answered the complaint with a general denial and filed a counter claim in which it set up the trust deed as a mortgage and asked that it be foreclosed. Its defense against the charges of maladministration as trustee were answered with the defense it had no duties as trustee because the instrument under which it held was not a trust agreement but was a mortgage.

Printed Transcript Page 15.

It was the duty of the trust company at that time to set up its trusteeship and defend the trust estate. The trust company elected to do otherwise. It cannot change after the first case has gone to judgment. The issue became *res adjudicata*.

Northern Pac. R. Co. v. Ellis, 143 U. S. 458; 36 L. E. 504.
Great Western, etc. Co. v. Burnham, 162 U. S. 339; 40 L. E. 991.

Illinois v. Illinois Central R. Co., 184 U. S. 77; 46 L. E. 440.
Thompson v. Maxwell, etc. Co., 158 U. S. 451; 42 L. E. 539.
Thompson v. Maxwell, etc. Co., 168 U. S. 539; 42 L. E. 539.
Yazoo, etc. R. Co. v. Adams, 180 U. S. 7; 45 L. E. 395, 404.
New Orleans v. Warner, 180 U. S. 199; 45 L. E. 493.

18. That the proceedings in the Marion Circuit Court, with Judge Ewbank presiding, and Charles E. Cox first appearing with his client as trustee and the legal effect of those proceedings as a matter of fact are stated accurately in Clause 47.

Printed Transcript Pages 32-34.

A. The Marion Circuit Court was without jurisdiction pending the mandate of the Supreme Court to the Hamilton Circuit Court.

Gregory v. Purdue, 29 Ind., 66.

Coleman v. Barnes, 33 Ind., 93.

Plunkett v. Black, 117 Ind., 14.

Board v. Stout, 136 Ind., 53.

Scott v. Runner, 146 Ind., 12.

Westfall v. Wait, 161 Ind., 449.

Partlow v. State 134-N. E. 483, Adv. Sheets.

B. Judge Ewbank's interest, and his duty to the Malott estate were disqualifying under the laws of Indiana.

Juliana v. State, 167 Ind., 421.

Whitesell v. Metaker, 188 Ind., 126.

19. That the proceedings in the Hamilton Circuit Court when the Fidelity Trust Company first appeared as trustee and joined with the Fidelity Trust Company in its corporate capacity proper and as a banker to enforce a claim by the latter against the trust estate; the proceedings had with motions to get the truth into the record in respect of that claim; the pleading of the Ewbank judgment to the effect that these appellants were without an interest and were incompetent to defend and the legal effect of those proceedings are accurately stated in Clauses 48-49.

Printed Transcript Pages 34-48.

A. Before the trust company as a banker could assert a right of judgment against the trustee it must sue either the legal owner or the equitable owner, either the trustee or the *cestui que trust*. The State Courts held that there was no equitable owner and enjoined Dora E. Rooker and William V. Rooker from asserting that they were the equitable owners; there was no cross-complaint or other pleading tendering an issue as between the Trust Company as a banker and the Trust Company as trustee. Therefore there was no issue upon which a judgment could be rendered affecting the trust estate. The Supreme Court of Indiana in Jones v. Vert, 121 Ind., 140 stated the controlling rule in these words: "Ordinarily four

things must concur before the principle of *res adjudicata* can be invoked: 1. A suit. 2. A final judgment. 3. Identity of subject matter. 4. Identity of parties. The facts pleaded show all these elements were absent except the judgment. *State Ex Rel v. Page*, 63 Ind., 209. There was no suit between the present plaintiff and defendants, no cross bill having been filed. *Quick v. Brenner*, 120 Ind., 364. The subject in litigation was different and the parties are not the same. The defendants in the foreclosure suit might possibly have put the validity of the vendors lien in issue by filing a cross-complaint. *Woolery v. Grayson*, 110 Ind., 149. This does not appear to have been done and we cannot presume that it was. There does not seem to have been any issue tendered or made, between the defendants. In short, there does not appear to have been any suit pending between them. Any judgment, therefore, that the court may have pronounced, which purported to settle any title or claims between the defendants was *coram non judice* and void."

McFadden v. Ross, 108 Ind., 512.

Griffin v. Wallace, 66 Ind., 410.

Johnson v. Graves, 129 Ind., 124.

Clements v. Davis, 155 Ind., 624.

Oglebay v. Todd, 166 Ind., 250.

Brignardello v. Gray, 1 Wall, 627; 17 L. E. 692.

19. That the proceedings at the second trial of the cause in the Hamilton Circuit Court and the legal effect thereof as a matter of fact are stated accurately in Clause 50. These proceedings show how the Hamilton Circuit Court arbitrarily and capriciously disregarded the probative force and effect of its own records, the writs and returns of its own officers; the written instruments underlying the case and other equally unimpeachable matter.

Printed Transcript Pages 48-49.

20. That the judgment at the second trial of the cause in the Hamilton Circuit Court and the proceedings had thereon to clarify the truth and the legal effect thereof as matters of fact are stated accurately in Clause 51-54.

Printed Transcript Pages 49-54.

21. That the assignments of error and the second opinion and judgment of the Supreme Court of Indiana and the supplemental proceedings in this Court are stated accurately in Clauses 55-57.

Printed Transcript Pages 54-69.

22. That the proceedings of the respondents under said judgments to the effect that they are and constitute a trust by implication of law and not conventional are stated accurately in Clauses 58-61.

Printed Transcript Pages 69-77.

23. That the damages sustained by and the grievances inflicted upon these appellants are stated accurately in Clauses 62-63. The prayer for relief in the District Court follows Clause 63.

Printed Transcript Pages 77-78.

ARGUMENT

Mrs. Rooker attempted to pay her debts upon the arrangement recited in the trust agreement but she failed because the trustee repudiated the trust agreement and renounced the trusteeship.

Mrs. Rooker attempted to pay her debts by showing her situation to the Circuit Court and asking that a receiver be appointed to administer the trust *pendente lite*. But she failed. The Courts held that she was without any interest in her own estate and she has been menaced with imprisonment because she asserted her interest.

Her estate has now been taken from and is being administered as a trust by implication of law, although not a single act is being done in pursuance of the law concerning statutory trusts. She asked the District Court to let her know what sums if any she should pay and what acts she should perform to redeem her property. She failed.

Her last resort is to this court. She asks for justice. May it be granted to her?

Respectfully submitted

William Velpeau Rooker

Solicitor for Appellants.

NOV 5 1921

W. B. STANS

OF

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

Term No. 295.

DORA E. HOOKER AND WILLIAM V. HOOKER,
Appellants,

v.

FIDELITY TRUST COMPANY, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF INDIANA.

APPELLEES' MOTION TO DISMISS OR AFFIRM AND
BRIEF THEREON.

CHARLES E. COX,
Indianapolis, Indiana,
Counsel for Defendants in Error.

HENRY SWYFELD,
Of Counsel.

R. A. HARDIN PRINT, INDIANAPOLIS

File No. 29550.

File No. 29550.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1923.

TERM No. 295.

DORA E. ROOKER AND WILLIAM V. ROOKER,
Appellants,

v.

FIDELITY TRUST COMPANY, ET AL.,
Appellees.

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF INDIANA.**

MOTION TO DISMISS OR AFFIRM.

The appellees in the above entitled cause, by its counsel appearing in that behalf, respectfully move the court to dismiss the appeal in said cause for want of jurisdiction in that the order, judgment, or decree from which

the appeal is taken is not of a character which this court will review, in this, to-wit: (1) The dismissal by the District Court of appellants' bill of complaint was clearly a correct judgment for the reason that the bill involved palpably a collateral attack on judgments of state courts which it is not within the authority of another court to entertain and hence the issue of jurisdiction of the District Court as a Federal tribunal as such is not involved; (2) the dismissal by the District Court of the appellants' bill of complaint was clearly a correct judgment for the reason that the bill of complaint shows on its face by its averments, statements and recitals that the District Court as a Federal court had no jurisdiction of the subject matter of the suit in this, that it appears from the bill that the suit was between citizens of the State of Indiana and that no question was substantially or really involved therein arising under the Constitution or laws of the United States, or treaties made under their authority, but on the contrary that it was obviously a collateral attack on judgments of the State courts; (3) the dismissal by the District Court of appellants' bill of complaint was clearly a correct judgment for the reason that it is clearly manifest from the averments, statements and recitals of the bill that any claim of jurisdiction of the District Court as a Federal court because of Federal questions is and was so ephemeral and without any foundation as to be fictitious, dishonest and fraudulent and made only to hinder, vex and delay appellees and the due administration of the law, and to constitute only a collateral attack on the judgments of State courts of general and competent jurisdiction.

And appellees, by counsel as aforesaid, also respectfully move the court, for the reasons and upon the grounds hereinabove set out and numbered (1), (2) and (3), to affirm the said order, judgment or decree from which said appeal purports to be taken even though the record in said cause may show that this court has jurisdiction in the premises.

CHARLES E. COX,

*Counsel for Appellees for the
purpose of these motions.*

HENRY SEYFRIED,
Of Counsel.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1923.

DORA E. ROOKER ET AL.,

Appellants,

v.

FIDELITY TRUST COMPANY, ET AL.,

Appellees.

} No. 295.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF INDIANA.

NOTICE OF SUBMISSION OF MOTION TO DISMISS.

To William V. Rooker, counsel for appellants in the
above entitled cause:

You will please take notice that on Monday, the 26th
day of November, 1923, at the opening of the court, or as
soon thereafter as the court can hear counsel, the motions
of which the foregoing are copies will be submitted to the

Supreme Court of the United States for the decision of said court thereon.

Annexed hereto is a copy of the brief argument to be submitted with said motions in support thereof.

CHARLES E. COX,
*Counsel for Appellees for the
purpose of these motions.*

HENRY SEYFRIED,
Of Counsel.

Received copy of the foregoing notice, and the attached
motions and brief this _____ day of November, 1923,
at Indianapolis, Indiana.

Counsel for Appellants.

BRIEF OF APPELLEES ON MOTION TO DISMISS AP-
PEAL OR AFFIRM JUDGMENT OF
DISTRICT COURT.

STATEMENT OF THE CASE.

This is an appeal from a decree of the District Court for the District of Indiana, dismissing a bill of complaint filed by appellants March 17, 1923.

The bill is very long, containing many averments of fact, and statements and recitals and many conclusions both of fact and law. It covers the first seventy-eight of the eighty-five pages of the printed transcript of the record. It would be inexcusable to set it out here. The motion to dismiss is to be found on page 80 of the printed transcript.

PREFATORY.

It is deemed not improper here to set forth the chronology of this case up to date as counsel for appellants has made it in his long search for "due process of law" and "equal protection of the law" which it is claimed has not as yet been attained. This chronology in the main appears from the statements, recitals and averments of appellants' bill now before this court in pages 1 to 78 of the printed transcript of the record.

No. 22658, *Rooker v. Fidelity Trust Co.*, Reversed, 185 Ind. 172.

- No. 10444, *Rooker v. Fidelity Trust Co.*, Appellate Court. Affirmed without opinion—Petition to transfer denied.
- No. 23591, *Rooker v. Fidelity Trust Co.*, Supreme Court. Original Action for Writ of Prohibition—Demurrer to complaint sustained.
- No. 23598, *Rooker v. Fidelity Trust Co.*, Supreme Court. Affirmed—Ind. 131 N. E. 769; S. C. U. S. Supreme Court—Petition for Writ of Certiorari denied—Writ of Error dismissed.
- No. 23676, *Rooker v. Fidelity Trust Co.*, Supreme Court. Pending on motion to dismiss and briefs on the merits.
- No. 24190, *Rooker v. Fidelity Trust Co.*, Supreme Court. Dismissed October 4th.
- No. 665. *Rooker v. Fidelity Trust Co.*, Original action for injunction and damages in U. S. District Court. Dismissed for want of jurisdiction. Appealed to S. C. of U. S. No. 295 this term.
- No. 24366, *Rooker v. Fidelity Trust Co.*, Supreme Court. Appeal from an order for a Writ of Assistance.
-

THE FACTS SHOWN BY THE BILL OF COMPLAINT.

In so far as it is possible to make an intelligent and intelligible analysis of the very remarkable document filed as the bill of complaint and to which the foregoing motion to dismiss is addressed the following appears:

The defendant trust company is a trustee under certain deeds and instrument of trust which are set forth in

the bill and which, at the time of their execution in 1909, conveyed the fee simple title to certain real estate in Hamilton and Marion Counties, Indiana, to said trust company and constituted it trustee thereof to preserve it from dissipation by pressing creditors of the settlors of the trust by advancing money therefor, to sell said lands, clear the debts against them, reimburse itself and pay the amount remaining if any to one of the settlors as a *cestus que trust*.

(These instruments are set out possibly accurately on pages 8 to 20, inclusive, of the bill, pages 8 to 10, Printed Transcript.)

In 1912 defendant was led to treat the deeds and trust agreement as constituting a mortgage and demanding from plaintiffs the repayment of near \$20,000 which at that time, had been advanced by it in accordance with the agreement and tendered a deed re-conveying the lands. (Pages 11, 50 and 61, Printed Transcript.)

Immediately thereafter plaintiffs sued the trust company alleging a repudiation of the trust, a violation of its terms, waste and other matters and demanding an accounting, a receiver and damages. (Page 12 of Printed Transcript.)

To this complaint the trust company appeared and filed a counterclaim based on the theory that the deeds and trust agreement constituted a mortgage and asked foreclosure. (Pages 15 and 16 of Printed Transcript.)

There were general denials to the complaint and to the counterclaim. (Page 17 of Printed Transcript.)

The finding was against plaintiffs on their complaint and in favor of defendant on its counterclaim and foreclosure was decreed. (Page 17 of Printed Transcript.)

The judgment was reversed on appeal by the Supreme Court of Indiana which held that the deeds and trust agreement did not constitute a mortgage but an absolute and indefeasible deed of trust with plaintiffs possessing an equitable interest in the estate analogous to that of other creditors. (Pages 18 to 27 of Printed Transcript; 185 Ind. 172.)

The mandate of the Supreme Court on reversal was that the trial court should sustain the motion of plaintiffs "for a new trial, and for further proceeding in accordance with this opinion". (Page 27 of Printed Transcript.)

On return to the trial court much useless and immaterial record was made but the issues were in a measure reformed. The trust company filed an amended counterclaim *based on the opinion of the Supreme Court*. (Pages 45 to 48 and 55 of Printed Transcript.) After a trial by the court the facts were found specially and conclusions of law were stated thereon. These were all in favor of the trust company, trustee, and against plaintiffs on the various issues formed. (Pages 56 to 63 of Printed Transcript.) The court's decree, favorable to the trust company, trustee, followed and in it the trustee's title was quieted, it was given judgment on account for \$50,697.00, it was ordered to make sale of the trust estate in accordance with the trust agreement; the decree enjoined plaintiffs from interference and it ordered the trustee to distribute the proceeds of the sale in accordance with the trust agreement paying the residue if any to Dora E. Roeker as provided in said agreement. (Pages 49 to 51 and 63 to 65 of Printed Transcript.)

Another appeal was taken by Plaintiffs from this second judgment to the Supreme Court of Indiana which court

affirmed it on all of the assignments of error made on the record by an opinion by Willoughby, J., in which all of the questions raised were decided favorably to the trustee, the defendant trust company, on the authority of principles of local and general law. (Pages 55 to 68 of Printed Transcript.)

A petition for a rehearing was denied by that court and plaintiffs attempted to have the case reviewed by the Supreme Court of the United States by Certiorari and Writ of Error but failed for want of a Federal question. (Page 68 of Printed Transcript; 43 Supreme Court Reporter No. 9, March 15, 1923, p. 288.)

The above and foregoing are the material facts in the bill. There is much else in the bill that is untrue, distorted conclusions contrary to the averred facts, or irrelevant material.

FEDERAL QUESTION ASSERTED BY BILL.

Upon these facts it is averred that the following Federal questions arise:

1. That the last judgment of the Hamilton Circuit Court, affirmed by the Supreme Court of Indiana, and which the Supreme Court of the United States refused to review because no Federal question cognizable by that court was involved, in connection with an act of the general assembly of Indiana of 1913 as amended in 1915, impaired the obligation of the trust agreement involved and hence violated Section 10 of Article 1 of the Federal Constitution. (Page 2, paragraph 4 of bill, p. 2 of Printed Transcript.)

2. That the aforesaid judicial proceedings have taken and threaten to continue taking the plaintiff's property without due process of law and have denied and threaten to continue denying to plaintiffs the equal protection of the law in violation of the Fourteenth Amendment to the Federal Constitution. (Page 3, paragraph 5 of bill, p. 2 of Printed Transcript.)

These claims of the existence of a Federal question on the facts averred within the original jurisdiction of the District Court obviously have no foundation. They are patently the emanations of a dishonest and a malicious mind centered on a vicious purpose to obstruct, harass and ultimately to rob the good samaritan who came to the rescue of plaintiffs in a time of dire need of all that had been advanced for plaintiff's benefit.

It appears from the averment of the bill as stated above that plaintiffs sued the defendant trust company, trustee, in the circuit courts of Marion and Hamilton counties. The latter was the main case. In both plaintiffs were defeated in the trial court. Both were appealed and the main case was reversed as indicated in the statement of facts above. The Marion county case was affirmed. The mandate in the main case was to grant a new trial and for further proceedings in accordance with the opinion. (*Rooker v. Fidelity Trust Co.*, 185 Ind. 172.) The trustee filed its second counterclaim on the trust theory in accordance with the opinion. In it the facts were averred "very fully and in circumstantial detail". (Page 135 of bill, 3 p., 67 of Printed Transcript.) *Rooker v. Fidelity Trust Company*, 191 Ind. --, 131 N. E. 769. It appears from the facts averred that the statute of Indiana relating to pleading con-

clusions had no application whatever. (Acts 1913, p. 850; Acts 1915, p. 123; 5 Burns 1921, Sec. 345.)

It appears from the facts averred the Supreme Court of the United States refused to review the decision of the Supreme Court of Indiana.

Rooker v. Fidelity Trust Co., 43 Supreme Court Reporter, p. 288, No. 9, March 15, 1923.

It appears from the facts averred in the bill that in the second trial of the main case the Hamilton Circuit Court was bound to obey the mandate of the Supreme Court and proceed further in accordance with the latter court's opinion. To thus proceed it was essential that the trustee should amend its pleading. This it did and made it conform to the Supreme Court's opinion declaring the law. The second trial was had in conformity to the law as plaintiffs procured it to be declared. Plaintiffs were defeated on all the issues as clearly appears from the opinion of the Supreme Court of Indiana. There was not in the second opinion of the Supreme Court of Indiana any change of its decision in the first appeal. If there had been such a change it could not raise the Federal question of the impairment of the contract.

Rooker v. Fidelity Trust Co., -- U. S. --, 43 Supreme Court Reporter, p. 288, U. S. Sup. Ct. Adv. Opinions, No. 10, March 15, 1923, p. 339.

That the State of Indiana had power to enact the remedial act of 1913-15 is perfectly obvious.

It appears from the facts pleaded in the bill that the decisions of the State Courts in this case were not in any way in conflict with Section 10 of Article 1, forbidding the impairment of contracts, or the due process or equal protection clauses of the Fourteenth Amendment and that fact is also entirely and clearly patent from the statements of the issues and decisions of the Circuit Court of Hamilton County and the Supreme Court of Indiana. The act in question was in no way applied to or applicable to the counterclaim of defendant in that case. (Opinions of Supreme Court of Indiana, Printed Transcript, pp. 55 to 68.)

The facts averred in the bill and the statements and recitals therein show very baldly that the bill is and was nothing more than a collateral attack on the judgments of the State courts which, of course, had jurisdiction of the parties and the subject matter.

BRIEF OF THE ARGUMENT ON MOTIONS.

It appearing affirmatively by the averments of appellants' bill that the Supreme Court of Indiana and the other state courts whose judgments are assailed by the bill had jurisdiction of the subject matter and of the parties, invoked by appellants themselves in every instance, it is necessarily an elementary proposition to say that the bill involved only a bald and undisguised collateral attack on those judgments which it is not within the authority of another court, whether Federal or State, to entertain. Hence, the District Court, irrespective of its character as a Federal tribunal, was without jurisdiction.

Forsyth v. City of Hammond, 166 U. S. 506, 516,
41 L. ed. 1095, 1099;

Scotland County v. Hill, 132 U. S. 107, 114, 33 L.
ed. 261, 264;

Chicago, etc., R. Co. v. Wiggins Ferry Co., 108 U.
S. 18, 27 L. ed. 636;

Canjolle v. Curtis, 13 Wall. 465, 2 L. ed. 507.

The judgment of the District Court dismissing appellants' bill from which this appeal is attempted is amply broad enough to support a reason for the dismissal based upon the fact that the bill presented a collateral attack not to be entertained by any court, Federal or otherwise (which as a matter of fact was the reason), hence this appeal does not necessarily involve a question of the jurisdiction of the District Court as a Federal tribunal and this court will not take jurisdiction to review the action of the District Court.

Schweer v. Brown, 195 U. S. 171, 49 L. ed. 144;

Bien v. Robinson, 208 U. S. 423, 52 L. ed. 556;

Louisville Trust Co. v. Knott, 191 U. S. 225, 48 L. ed. 159;

Blythe v. Hinckley, 173 U. S. 501, 43 L. ed. 783.

It is very plain from the averments of fact, recitals and statements of the bill, particularly the recital of the opinion of the Supreme Court of Indiana that the statute of Indiana, complained of by appellants, relating to pleading conclusions had no application to and was not applied to any pleading in the case during its entire course. (Acts 1913, p. 850; Acts 1915, p. 123; 5 Burns 1921, Sec. 345.) Hence no Federal question can rest upon it.

If the statute had been involved and had been upheld by the courts of Indiana the Federal questions asserted could not arise from such action.

IMPAIRMENT OF CONTRACT.

In modes of proceeding and forms to enforce the contract, the Legislature has the control and may enlarge, limit, or alter them, provided it does not deny a remedy or so embarrass it with conditions or restrictions as seriously to impair the value of the right.

Penniman's Case, 103 U. S. 710, 26 Law ed. 602-605;

Brown v. New Jersey, 175 U. S. 172, 175;

Davis v. Rupe, 114 Ind. 588-592;

6 R. C. L., p. 363, Sec. 358, *et seq.*

EQUAL PROTECTION.

There is no vested right in a mode of procedure and this constitutional guaranty does not prevent a legislature from changing modes of procedure.

6 R. C. L., p. 429, Sec. 426;

Backus v. Ft. St. Union Depot, 169 U. S. 557, 570,
571, 42 L. ed. 858.

DUE PROCESS.

It must be perfectly obvious that there is nothing in the act of 1913-15 that deprives of due process of law. And of course an erroneous decision of a court does not deprive of due process.

It is settled that the mere averment of a constitutional question is not sufficient to invoke the original jurisdiction of the District Court or to impel this court to take jurisdiction of an appeal between these parties, it being obvious that the question sought to be presented is so wanting in merit as to cause it to be frivolous, or without any support whatever in reason.

Goodrich v. Ferris, 214 U. S. 71, 58 L. ed. 914;

Knop v. Monongahela, etc., Co., 211 U. S. 485,
487, 58 L. ed. 294;

O'Callaghan v. O'Brien, 199 U. S. 89, 50 L. ed. 101,
107.

Of course the claim of a Federal question must be real and colorable, not fictitious and fraudulent.

Penn. Mutual v. Austin, 168 U. S. 685, 695, 42 L.
ed. 626, 630.

The claim must be real and substantial.

Lampasas v. Bell, 180 U. S. 276, 45 L. ed. 527, 580.

"It behooves the court to see to it that the question on which the court's power depends is really presented and if not, because, although in form arising it is in substance so wholly wanting in merit as to be frivolous, to decline the exercise of jurisdiction."

Brolan v. U. S., 236 U. S. 216, 59 L. ed. 544, 547.

The facts embodied in the finding of the trial court and set forth in the bill of complaint plainly disclose that the questions presented are frivolous, that the decision of the State court was right on the merits, that appellants have long been waging vexatious litigation, were justly defeated on the judgment of the State courts on the facts, and that this attempted appeal is solely for delay and the great embarrassment of appellees. Hence the writ of error should be dismissed or the judgment affirmed.

CHARLES E. COX,

Counsel for Defendant in Error.

HENRY SEYFRIED,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1923.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF INDIANA.

DORA E. ROOKER, ET AL.,

Appellants,

vs.

FIDELITY TRUST COMPANY, ET AL.,

Appellees.

No. 295.

APPELLANTS' BRIEF ON APPELLEES' MOTION TO
DISMISS OR AFFIRM.

THE MOTION TO DISMISS.

The appellees move to dismiss or affirm and serve notice of the submission of their motion. May we here examine the motion to dismiss?

The appellees, with their motion to dismiss, seek again to prevent the consideration of this case on its merits, for while the sole question here is whether the District Court

had jurisdiction, it is obvious that the mandate of this Court on a reversal would be that the District Court proceed with the trial of the case stated in the bill, and hence to hear the cause upon its merits.

The attitude of the appellees in this motion is the same as the attitude of the parties so aptly stated by Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, 377, 5 L. E. 257, 284, viz.: "They exclude the inquiry whether the Constitution and laws of the United States have been violated by the judgment which the plaintiffs in error seek to review, and maintain that, admitting such violation, it is not in the power of the government to apply a corrective."

This exposition of the law thus made by the distinguished Chief Justice has been adhered to by this Court with such constant fidelity that it would be presumptuous here to recite the instances with a statement of the cases.

It is obvious, also, that the appellees are deeply impressed with the rule as stated by Chief Justice Marshall, because here they seek to avoid that rule with a statement of cases not in point. The first of their cases, *Forsyth v. City of Hammond*, 166 U. S. 506, 516; 41 L. E. 1095, 1099, was a case which got into the Federal Courts on the ground of diverse citizenship,—a ground of jurisdiction which tendered no issue, "whether the Constitution and laws of the United States have been violated."

The second case they cite, *Scotland County v. Hill*, 132 U. S. 107; 33 L. E. 636, is one wherein this Court affirmed the judgment of a circuit court which determined the validity of certain county bonds upon issues apart from those which entered into a previous state court judgment which

was not in accord with the subsequent judgment of the Federal Circuit Court. It would seem that the citation is quite against the appellees rather than in their favor.

The third case they cite, *Chicago, etc., R. Co. v. Wiggins Ferry Co.*, 108 U. S. 18; 27 L. E. 636, is a removal case and the matter at issue was whether the Federal jurisdiction should have attached on removal from the inferior state court or on writ of error to the Supreme Court of the state. The United States Circuit Court had remanded the case to the state court and the writ of error out of this Court was to review the order remanding the case to the state court because the Federal question was not presented properly upon the record. This Court held that the state court judgment was binding and effective in the absence of some proper proceeding to have it reversed or set aside. This Court's further analysis of the subject is clearly to the effect that the claim of a Federal right was not based upon sufficient foundation. This Court affirmed the judgment of the Circuit Court. Again, it would seem that the citation is quite against the appellees rather than in their favor.

The fourth case they cite, *Caujolle v. Curtiss*, 13 Wall. 46; 20 L. E. 507, is one wherein this Court affirmed the judgment of a Circuit Court which refused to disturb judgments in probate of the New York courts where the sole ground for Federal jurisdiction appears to have been diverse citizenship. Again, it would seem that the citation is quite against the appellees rather than in their favor.

The appellees say at page 14 of their brief, the prevailing rule as to collateral attack "which as a matter of fact was the reason," was the ground upon which the District Court dismissed the bill. Is it not unusual that counsel

should state as a "matter of fact" that which should be submitted to this Court as a "matter of law"?

Is it possible that we shall be called upon here to challenge this statement "of fact," or be silent at the peril of having this Court misled to the belief that the statement must be true, because it goes unchallenged?

As a "matter of fact" the daily press gave to the District Judge almost a column on the first page to the effect that he did not purpose to allow his court to be used to examine the record of Judge Louis B. Ewbank. The District Court's position distinctly made the right of the appellants to claim the protection of the Constitution and laws of the United States conditional and dependent. The right to that claim might be made if it did not involve an issue of judicial misfeasance, although affecting jurisdiction, because the issue of judicial misfeasance, whether or not it affected jurisdiction, was subordinate to the principle of judicial immunity to any scrutiny and the principle of judicial immunity, being paramount, it suspended the functions of the Constitution and laws of the United States. *Sic transit gloria patriae!*

It is only because our silence as to "matters of fact" might lead this Court into misapprehension, that we speak at all on this subject. It is entirely unfortunate that "matters of fact" should have been brought into the issues of law here to be considered.

Following are some of the cases where Federal courts have protected Federal rights as against judgments of other jurisdictions:

Ross v. Himely, 4 Cr. 241; 2 L. E. 608;
Windsor v. McVeigh, 23 U. S. 274; 23 L. E. 915;
Pennoyer v. Neff, 95 U. S. 714; 24 L. E. 565;
Reynolds v. Stockton, 140 U. S. 254; 35 L. E. 464;
Hovey v. Elliott, 167 U. S. 409; 42 L. E. 215.

This Court has held that it is a Federal question, giving this Court jurisdiction, to determine whether there was jurisdiction in the inferior court, and that where jurisdiction exists in this Court it will not dismiss but will affirm or reverse the judgment below as law and justice may require.

Blackburn v. Portland Gold Mining Co., 175 U. S. 571; 44 L. E. 276;

Giles v. Harris, 189 U. S. 475; 47 L. E. 909.

THE MOTION TO AFFIRM.

But are the Constitution and laws of the United States and the right of the appellees to claim their protection subordinate to the immunity of a judge who has pursued a course which, in Indiana, at least, is without precedent and *sui generis*? Nor is this situation rendered any less acute with the fact that Charles E. Cox, upon his retirement from the Supreme Court of Indiana, where he participated in the decision in *Rooker v. Fidelity Trust Company*, 185 Ind. 172, became counsel for the Fidelity Trust Company and, disregarding the mandate in that case to the Hamilton Circuit Court for a retrial of the issues, instituted the unprecedented cross-complaint before Judge Ewbank and thereon took judgment to the effect that these appellees were wholly without any interest in their trust estate and should be enjoined from further asserting that they had any interest. Cox knew that Ewbank's court was wholly without jurisdiction and that its judgment was void.

Gregory v. Purdue, 29 Ind. 66;
Coleman v. Barnes, 33 Ind. 93;
Wiley v. Pavey, 61 Ind. 457;
Plunkett v. Black, 117 Ind. 14;
Board v. Stout, 136 Ind. 53;
Scott v. Runner, 146 Ind. 12;
Westfall v. Wait, 161 Ind. 449;
Partlow v. State, 134 N. E. 483.

This injunction, entered by the Marion Circuit Court, was employed afterwards in the Hamilton Circuit Court to prevent Dora E. Rooker and William V. Rooker from defending their trust estate against the joint counterclaim of "the Fidelity Trust Company in its corporate capacity proper and as trustee," wherein the trustee pleaded that the Rookers had no interest and no right to defend the trust estate against the claim of the Trust Company as a banker—"in its corporate capacity proper."

The Hamilton Circuit Court, following the Marion Circuit Court, held that the claim of the Rookers to any interest or right in their trust estate was unlawful and without right and its further assertion should be enjoined.

There was no counterclaim, cross-bill or other pleading which tendered any issue as between the Trust Company as trustee and the Trust Company as creditor of the trust estate. But there was a judgment rendered in favor of the creditor for \$50,697.00, a large part of which was for interest claimed during the years while the Fidelity Trust Company held the property of the trust estate under sheriff's deeds and adversely to the trust estate.

The money judgment in this case, in the state courts, is not founded upon any issue between the creditor of the trust estate and the trustee of the trust estate, and therefore the money judgment was *coram non judice* in the state court and void.

Elliott v. Stevenson, 21 Ind. 359;

Griffin v. Wallace, 66 Ind. 410;

McFadden v. Ross, 108 Ind. 512;

Sims v. Burk, 109 Ind. 214;

Jones v. Vert, 121 Ind. 140;

Webb v. John Hancock, etc., Co., 162 Ind. 616.

The necessity for cross-bills in order to tender issues which would save a judgment from being *coram non judice* and void has been pointed out by this Court.

Kippendorf v. Hyde, 110 U. S. 276; 28 L. E. 145;

Pacific R. Co. v. Missouri R. Co., 111 U. S. 505; 28 L. E. 498;

Morgan's La., etc., Co. v. Texas, etc., R. Co., 137 U. S. 171; 34 L. E. 625.

This Ewbank injunction, to the effect that Dora E. Rooker and William V. Rooker were without any interest in the property of the trust estate, that their claims to any interest in said property were wrongful and unlawful and that the further assertion of any such claim of interest should be forever restrained and enjoined, was pleaded in and adopted by the Hamilton Circuit Court. The Ewbank

judgment and the pleadings which brought it into the issues and made it effective in the Hamilton Circuit Court had these results, viz.:

A. It defeated the right of Dora E. Rooker and William V. Rooker to an accounting. But the remedy of an accounting was one to which they were entitled in a proper case under the Contract clause of the Federal Constitution.

B. It denied to the trust estate a defendant to the joint counterclaim of the Fidelity Trust Company as trustee of the estate and the Fidelity Trust Company as creditor of the estate. But the right to protect their interests in the trust property under the trust contract was a contract remedy which could not be taken from Dora E. Rooker and William V. Rooker because of the Contract clause of the Federal Constitution, and also it was a property right in the law which could not be taken from them, as was done in the instant case, without contravention of the equal protection and the due process clauses of the Fourteenth Amendment.

C. It denied to Dora E. Rooker and William V. Rooker the right to assert and claim any remedies of any kind because of the breach of the trust agreement and thereby took from them all those qualities and provisions of the law, which being the consideration of the contract, constituted its obligation.

D. It changed the conventional trust created by Dora E. Rooker and William V. Rooker to a trust by implication of law and thereby denied their right to deal with their property with executory contracts. That change destroyed the obligation of the contract, destroyed its mutuality and

substituted the State of Indiana with its laws in the place and stead of Dora E. Rooker and William V. Rooker with their executory contracts rights.

E. It changed in law an executory contract to a contract which had been executed and performed, and this without performance in fact, or, to state it otherwise, it absolved the Trust Company from the obligation of performance of the trust contract and did this upon the mere assertion of the trustee that the contract had been performed, when in fact the face of the instrument showed a contract performable only *in pais* and incapable of being at one and the same time both actionable and non-actionable.

All these changes to the prejudice of these appellants were effected through the agency of the act of the General Assembly of Indiana entitled "An Act concerning procedure in civil and criminal cases," as amended March 15, 1913, which purports to authorize a party to plead conclusions instead of facts and which, because it thus permits the denial of the terms of a contract, impairs its obligation in contravention of Article I, section 10, of the Constitution of the United States.

But these suggestions with others which appear in our general brief go to the case upon its general submission on the assignment of error rather than upon this motion to affirm.

The brief of the appellants upon the assignment of errors on this appeal is on file. We respectfully ask the

Court to look into that brief for an amplified statement of questions to be determined.

Respectfully submitted,

WILLIAM VELPEAU ROOKER,
Attorney for Appellants.

Received copy of the foregoing brief this-----
day of November, 1913.

Attorney for Appellees.

legislation of Congress, for correction of errors in deciding questions involving the Constitution, is to the appellate jurisdiction of this Court. P. 415.

2. The District Court has no jurisdiction of a suit brought there by the party who was defeated in the state courts, against his successful opponents, all citizens of the same State, to set aside the judgment as void because of errors alleged to have been committed by the state courts in deciding constitutional questions. P. 416.

3. A judge is not disqualified to sit in a case involving the duties of a corporation under a conventional trust merely because of being one of the executors and trustees to whom shares of stock in corporations holding property under like trusts have passed for administration and disposal under a will. P. 417.

Affirmed.

APPEAL from a decree of the District Court which dismissed a bill for want of jurisdiction.

Mr. Charles E. Cox, for appellees, in support of the motion. *Mr. Henry Seyfried* was also on the brief.

Mr. William Velpeau Rooker, for appellants, in opposition to the motion.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This is a bill in equity to have a judgment of a circuit court in Indiana, which was affirmed by the Supreme Court of the State, declared null and void, and to obtain other relief dependent on that outcome. An effort to have the judgment reviewed by this Court on writ of error had failed because the record did not disclose the presence of any question constituting a basis for such a review. *Rooker v. Fidelity Trust Co.*, 261 U. S. 114. The parties to the bill are the same as in the litigation in the state court, but with an addition of two defendants whose presence does not need special notice. All are citizens of the same State. The grounds advanced for resorting to the District Court are that the judgment

was rendered and affirmed in contravention of the contract clause of the Constitution of the United States and the due process of law and equal protection clauses of the Fourteenth Amendment, in that it gave effect to a state statute alleged to be in conflict with those clauses and did not give effect to a prior decision in the same cause by the Supreme Court of the State which is alleged to have become the "law of the case." The District Court was of opinion that the suit was not within its jurisdiction as defined by Congress, and on that ground dismissed the bill. The plaintiffs have appealed directly to this court under § 238 of the Judicial Code.

The appellees move that the appeal be dismissed, or in the alternative that the decree be affirmed.

The appeal is within the first clause of § 238; so the motion to dismiss must be overruled. But the suit is so plainly not within the District Court's jurisdiction as defined by Congress that the motion to affirm must be sustained.

It affirmatively appears from the bill that the judgment was rendered in a cause wherein the circuit court had jurisdiction of both the subject matter and the parties; that a full hearing was had therein; that the judgment was responsive to the issues, and that it was affirmed by the Supreme Court of the State on an appeal by the plaintiffs. 191 Ind. 141. If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. *Elliott v. Peirsol*, 1 Pet. 328, 340; *Thompson v. Tolmie*, 2 Pet. 157, 169; *Voorhees v. Bank*

of *United States*, 10 Pet. 449, 474; *Cornett v. Williams*, 20 Wall. 226, 249; *Ex parte Harding*, 120 U. S. 782. Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character. Judicial Code, §237, as amended September 6, 1916, c. 448, § 2, 39 Stat. 726. To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original. Judicial Code, § 24. Besides, the period within which a proceeding might be begun for the correction of errors such as are charged in the bill had expired before it was filed, Act September 6, 1916, c. 448, § 6, 39 Stat. 726, and, as is pointed out in *Voorhees v. Bank of United States*, *supra*, after that period elapses an aggrieved litigant cannot be permitted to do indirectly what he no longer can do directly.

Some parts of the bill speak of the judgment as given without jurisdiction and absolutely void; but this is merely mistaken characterization. A reading of the entire bill shows indubitably that there was full jurisdiction in the state courts and that the bill at best is merely an attempt to get rid of the judgment for alleged errors of law committed in the exercise of that jurisdiction.

In what has been said we have proceeded on the assumption that the constitutional questions alleged to have arisen in the state courts respecting the validity of a state statute, Acts 1915, c. 62, and the effect to be given to a prior decision in the same cause by the Supreme Court of the State, 185 Ind. 172, were questions of substance, but we do not hold that they were such,—the assumption being indulged merely for the purpose of testing the nature of the bill and the power of the District Court to entertain it.

A further matter calls for brief notice. The bill charges that the judgment of affirmance by the Supreme Court

of the State is void because one of the judges participating therein had an interest in the case which worked his disqualification. The case related to the duties and obligations of a corporation holding property under a conventional trust. The facts set forth to show the disqualification are as follows: Three of four years theretofore a citizen of the State had executed a will wherein he designated the judge as one of the executors and trustees under the will. The testator died about the time the case was submitted to the court, and the will was admitted to probate a day or two before or after the judgment of affirmance. The judge became an executor and trustee under the designation in the will. When the will was executed, and up to the time of his death, the testator owned many shares of stock in corporations holding property under trusts like that in question. The stock was to pass, and did pass, to the executors and trustees for administration and disposal under the will. The judge's relation or prospective relation to that estate and to the stocks belonging to it is the sole basis of the charge that he had a disqualifying interest in the case. We think the facts set forth and relied upon neither support nor tend to support the charge; and we experience difficulty in reconciling its presence in the bill with the care and good faith which should attend the preparation of such a pleading. Certainly the charge does not change the nature of the bill or require that it be given any effect which it otherwise would not have.

Decree affirmed.

**ROOKER ET AL. v. FIDELITY TRUST COMPANY
ET AL.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF INDIANA.**

**No. 295. Motion to dismiss or affirm submitted November 26, 1923.—
Decided December 10, 1923.**

1. Where a judgment has been rendered, after due hearing, by a state trial court, with jurisdiction of the subject matter and parties, and affirmed by the state Supreme Court, the only resort under the